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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

RALEIGH ELLIOTT, MARK ROCHELEAU, RICHARD ROWE and SYLVIA WELLS,

Petitioners,

vs.

STATE OF VERMONT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

PETITION FOR WRIT OF CERTIORARI

NEIL H. MICKENBERG, ESQ.
Counsel of Record
29 Pine Street
P.O. Box 406
Burlington, VT 05402-0406
(802) 658-6951

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Were the aboriginal fishing rights of the Missisquoi Abenaki Tribe extinguished merely by the "increasing weight of history" in the absence of any lawful means of extinguishment recognized by this Court?

2. Were Petitioners' due process rights violated by the Vermont Supreme Court's reliance upon secondary sources of information, not introduced at trial, to supply adjudicative facts?

PARTIES TO THE PROCEEDING

The parties listed in the caption, and no others, were parties to this action in the Vermont Supreme Court.

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vs.

STATE OF VERMONT,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Vermont Supreme Court is unofficially reported at 3 Vermont Law Week 226 and is reproduced as Appendix A. It is not yet officially reported. The decision of the Vermont District Court is not reported and is reproduced as Appendix B. Page references are to the version in the appendix.

JURISDICTION

The judgment of the Vermont Supreme Court was entered on June 12, 1992. A timely Motion for Reargument was filed by the Petitioners and that Motion was

denied by the Vermont Supreme Court on August 25, 1992. App. G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Article I, Section 8, Clause 3:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Indian Trade and Nonintercourse Act, Chapter 33, Section 4, 1 Stat 138:

> "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

An Act for the admission of the State of Vermont into this Union, Chapter 7, 1 Stat 191:

> "The state of Vermont having petitioned the Congress to be admitted a member of the United States, *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, and it is hereby enacted and declared,* That on the fourth day of March, one thousand seven hundred and ninety-one, the said state, by the name and style of "The State of

> Vermont," shall be received and admitted into this Union, as a new and entire member of the United States of America.
>
> Approved, February 18, 1791.

An Act giving effect to the laws of the United States within the State of Vermont, Chapter 12, 1 Stat 197-198 (March 2, 1791). App. H.

Section 4251(a) of Title 10, Vermont Statutes, provides, in relevant part:

> "(a) . . . a person shall not take wild animals or fish without first having procured a license therefor, provided, however, that a person under fifteen years of age may take fish in accordance with this part and regulations of the board, without first having procured a license therefor."

Section 4266 of Title 10, Vermont Statutes, provides:

> "A person who is required to have a license, as provided in section 4251 of this title, shall not take fish or wild animals, or transport fish, game or fur-bearing animals, unless at the time of such taking and transporting he has such license on his person. On demand of a game warden or other officer authorized by law to make arrests, or of the owner of the land on which such person is fishing or hunting, the licensee shall exhibit such license."

STATEMENT OF THE CASE

Introduction

On October 18, 1987, while fishing on the Missisquoi River in the Village of Swanton, Vermont, 36 Abenaki

Indians, including Petitioners, were charged under Vermont law with fishing without a license. Relying upon federal law, Petitioners moved to dismiss the charge on the basis that they were part of the Missisquoi Abenaki Nation and the tribe's aboriginal right to fish in its ancestral homeland, where the alleged offenses took place.[1] App. A 4, B 2.

Following a scholarly review of the federal law governing aboriginal rights and a detailed analysis of the facts, the trial court held that the Abenaki Indians have aboriginal title to their Missisquoi homeland, including the specific site where Petitioners were fishing, and that those rights have never been extinguished.[2]

The State sought and was granted permission to take an interlocutory appeal to the Vermont Supreme Court from the trial court's aboriginal rights decision. App. A 4.

As a preliminary matter, Petitioners wish to address the issue of finality of the Vermont Supreme Court's decision. Petitioners were issued citations for alleged violations of 10 V.S.A. § 4251 (fishing without a license) and 10 V.S.A. § 4266 (failure to display a fishing license). Both the trial court and the Vermont Supreme Court issued

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[1] The motion to dismiss was filed on May 2, 1988. The Vermont District Court held a six day evidentiary hearing on Petitioners' motion. An array of expert witnesses testified on behalf of the Petitioners. The State presented no expert testimony.

[2] The Abenaki's ancestral homeland, referred to herein and in the Record as "Missisquoi", is located in northwestern Vermont. The trial court's geographic description of Missisquoi is found at App. B 20.

lengthy opinions on the federal issues raised by Petitioners' Motion to Dismiss. The only remaining issues to be determined by the trial court are whether Petitioners were fishing without a license or failed to display a license on request. From the outset of this action, Petitioners' have relied upon their federal rights.

In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975) the Court described four categories of cases in which this Court has assumed jurisdiction of state court cases in which further state proceedings were contemplated. The present case falls into at least two of these categories.

The Court in *Cox* noted that although there may still be further proceedings yet to occur in the state courts, if reversal of the state court on the federal issue is conclusive of the action and there are important federal policy issues at stake, the Court would consider the decision on the federal issue final so as to allow review. *Id.* at 479.

In this case, the Vermont Supreme Court has described a standard for extinguishment of aboriginal rights which is contrary to long standing federal policy and law. Moreover, reversal on federal grounds would result in dismissal of the action.

A second exception to a strict interpretation of the finality requirement recognized by the Court in *Cox* exists when the federal questions that could come to the United States Supreme Court have been adjudicated by the State Supreme Court and regardless of the outcome of further State court proceedings, the federal issues will survive and require a decision. *Cox Broadcasting Corporation v. Cohn, supra,* at 481. In the instant case, the Vermont

Supreme Court decided the federal question raised by Petitioners. Regardless of the final determination of the criminal proceedings against them, the federal question as to the existence of their aboriginal title would still need to be decided by this Court. Nothing that could happen in the trial court would foreclose or make a decision on the federal question unnecessary. Under these circumstances, this action satisfies the jurisdictional requirements of 28 U.S.C. § 1257(a).

Although the Petitioners were fishing at a location which the Abenakis have occupied and used for fishing from time immemorial down to the present, the Vermont Supreme Court held that the Abenakis' aboriginal right to fish had been extinguished by Congress in 1791 when Vermont was admitted into the United States as the fourteenth state. In its decision, the Vermont Supreme Court crafted a new test for extinguishment of aboriginal title in instances in which none of the bases for extinguishment articulated by this Court are present. The decision concluded that Congress formulated an intent to extinguish on the basis of the cumulative weight of a series of events which occurred during the period from 1763 to 1791.

Constrained by the fact that none of those events even remotely fit within the several grounds for extinguishment established by this Court, and that Congress gave no indication whatsoever of an intent to extinguish, the decision nevertheless found that an extinguishment could be premised on the basis of an elusive and unprecedented theory which the Court referred to in its decision as the "increasing weight of history". App. A 20.

The decision is flawed in at least three fundamental respects:

(a) its legal theory of extinguishment is in direct conflict with this Court's holdings that an extinguishment must be based upon a plain and unambiguous act of the sovereign;

(b) it trivializes the well established policies of Great Britain and the United States of respect for Indian lands; and

(c) it bases its finding of Congressional intent to extinguish upon certain factual pre-conditions which it concludes Congress understood and ratified, and then completely ignores the uncontested finding that those pre-conditions were not met at the very location where the Petitioners were fishing.

In its rush to sweep away the Abenakis' aboriginal rights, the Vermont Supreme Court decision devised a theory of extinguishment which turns 169 years of federal jurisprudence on its head and which ignores the fact that even under the decision's own theory of extinguishment, Petitioners never lost their aboriginal rights at the location at which they were fishing on October 18, 1987.[3]

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[3] The Vermont Supreme Court's decision was based upon its review of the ninety-six page opinion of the Vermont District Court. Significantly, the appellate decision left the trial court's findings of fact undisturbed, describing them as "extensive", "meticulous", and "indicative of an exhaustive effort to reach just results in this case." App. A 10, 20.

The Missisquoi Abenaki Indians have occupied the Missisquoi region of northwestern Vermont for thousands of years.[4] The Abenakis were an important and well known tribe during the colonial period and to this day remain the principal Native American tribe in Vermont. Throughout their history, fishing has been at the center of the Abenakis' culture and subsistence economy.

Through an historic pattern of avoidance of conflict with the non-Indian community, the Abenakis have also avoided those circumstances which have led to an extinguishment of aboriginal rights in other cases. The Abenakis have never entered a treaty or otherwise ceded their aboriginal rights to anyone. They have never been removed from their land by military force and they have never voluntarily abandoned any portion of their homeland. Most importantly, there have been no explicit acts or expressions of intent to extinguish the aboriginal rights of the Missisquoi Abenakis by any government which has exercised or purported to exercise sovereignty in the Missisquoi area. App. B 14, 22, 36.

The events upon which the Vermont Supreme Court's decision is based spanned a period in which European sovereignty over what is now Vermont passed from Great Britain to the United States, with a sustained period of disputed sovereignty in between. Throughout this time and thereafter, the Abenakis maintained their traditional use and occupancy of their ancestral homeland.

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[4] The Abenakis have never left their Missisquoi homeland. Eighty to ninety percent of the tribe, some 2,600 individuals, continue to live there.

British Indian Policy

Control over what is now Vermont passed from France to England in 1760. Motivated by its desire to maintain peaceful relations with the Native population, the British Crown issued a Royal Instruction in 1761 and a Royal Proclamation in 1763, each of which prohibited Royal Governors and agents from making patents or grants to any lands claimed or possessed by the Indians. Such lands could only be acquired by formal purchase, with the consent of both the Indians and the Crown. European settlers who had settled on Indian lands were required to leave forthwith.

On July 3, 1741, Benning Wentworth was appointed Governor of the Royal Province of New Hampshire by King George II. New Hampshire's western boundary was the Connecticut River. Ignoring that boundary, between 1752 and 1764 Wentworth made 129 township grants in the area west of the Connecticut River. Three of these township grants, issued on August 17, 1763 and denominated as "St. Albans", "Highgate" and "Swanton", were located in the Missisquoi aboriginal territory.

Although the Abenakis were fully and openly occupying Missisquoi before, during and after 1763, no Native Americans were consulted or dealt with in conjunction with the grants. Indeed, none of the three grants even mentioned Indians. There is simply no question that the Wentworth grants of St. Albans, Highgate and Swanton were issued in direct violation of the Royal Instruction of

1761 and were revoked by the Royal Proclamation of 1763.[5]

Events in Missisquoi – 1763 – 1791

Within what was then the remote region of Missisquoi, European settlement came slowly. In 1765, the Royal Governor of lower Canada denied a land grant to a portion of the Missisquoi region on the basis that it was Indian land. App. B 30-31. Even by 1783, at the end of the American Revolution, only a handful of Europeans had settled in Missisquoi. App. B 22, 30.

By their terms, all of the Wentworth grants issued within what is now Vermont, including those to St. Albans, Highgate and Swanton, were conditioned upon settlement and cultivation within a period of five years from their issuance. Failure to fulfill the conditions would result in a reversion of the grants to the Crown. App. A 13. In fact, the areas covered by the St. Albans, Highgate and Swanton grants did not begin to be settled by Europeans until 1783, some twenty years after they were issued. App. B 30.

The fishing which precipitated this case took place at the location of what had been the Abenakis' central village, located on the lower Missisquoi River in what is now the Village of Swanton. Although the Abenakis lost

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[5] The Royal Proclamation of 1763, issued two months after the August 17, 1763 Wentworth grants, had retroactive effect. The Vermont Supreme Court's decision concedes that the grants were not authorized by the Crown and were *ultra vires*. App. A 20.

some of their choice farmlands to white settlement in the 1780's, their central village remained in place until 1798, well after Vermont's admission to the United States in 1791.[6] App. B 13.

European Political Disputes

While the Abenakis continued their occupancy and way of life in Missisquoi during the second half of the 18th century, a series of political struggles were taking place between European-Americans within what is now Vermont. These struggles concluded with Vermont's admission into the United States in 1791.

The grants which had been made by Governor Wentworth throughout much of what is now Vermont led to a lengthy dispute between the New York authorities, who claimed sovereignty over all of what is now Vermont and those settlers, principally in southern Vermont, whose claims were based upon the Wentworth grants.

In 1777, Vermont declared its independence and purportedly established an independent republic. The disputes continued, with Great Britain, New York and the supporters of the Republic each asserting control over the Vermont territory. To Petitioners' knowledge, no court has ever determined that Vermont achieved sovereignty as an independent republic. App. A 24, 28.

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[6] Although they were forced to leave their central village by 1798 due to the pressure of white settlement, the Abenakis remained within Missisquoi and do so to this day.

Following its declaration of independence, Vermont sought admission into the United States. The negotiations over admission spanned more than a decade and focused on resolution of the jurisdictional claims of New York, New Hampshire, and Vermont. While the jurisdictional claims of Vermont were based on the districts covered by the Wentworth grants, the negotiations clearly focused on the respective boundaries of Vermont and its neighboring states. The Record shows no negotiations concerning the Abenaki Indians at Missisquoi. App. A 18-19.

On March 4, 1791, Vermont was admitted to the United States. The Act of Admission merely acknowledges Vermont's admission into the Union as a new and entire member of the United States of America. In an Act approved March 2, 1791, Congress provided that the laws of the United States shall have the same force and effect within the State of Vermont as elsewhere in the United States effective on and after March 3, 1791. App. H.

The Vermont Supreme Court's Decision

The Vermont Supreme Court reviewed these historical events and concluded that in admitting Vermont into the United States, Congress was aware of the political disputes spawned by the Wentworth grants. The decision places particular emphasis on the fact that the Wentworth grants were conditioned upon settlement and cultivation and concludes, with little evidence to support its view, that Congress understood that the grants were possessory in nature and ratified them on that basis.

The decision concludes its analysis with Vermont's admission to the Union in 1791. In fact, there is absolutely

no evidence of any federally approved extinguishment of the Abenakis' aboriginal title after that date.

Glaringly omitted from the Vermont Supreme Court's discussion is any mention of the fact that the disputes over the Wentworth grants were exclusively between European settlers. In fact, the decision gives no indication that Congress intended the Wentworth grants to have any adverse impact on Abenaki land or on their traditional right to fish. Indeed, in contrast to the insistence by Congress that the proponents of Vermont statehood resolve their jurisdictional disputes with New York and New Hampshire, the decision gives not the slightest hint that Congress intended the Abenakis to yield rights to the claims of the Wentworth grantees.

Abenaki presence in Missisquoi during this period was certainly obvious. The Abenakis were living openly in their homeland throughout the period leading to Vermont's admission to the Union.

Although the Vermont Supreme Court's decision places great emphasis upon the possessory nature of the Wentworth grants, it never describes the extent or location of European settlement in Missisquoi prior to 1791 except in the vaguest terms. ("There is evidence . . . that during the years 1775 to 1785, the Missisquoi had lost control of choice farmland."). App. A 24. The decision does not determine that European settlement in Missisquoi was pursuant to the Wentworth grants and never concludes that the conditions of the Wentworth grants were fulfilled. Instead, the decision erroneously treats all of the Wentworth grants throughout Vermont in an identical fashion, without regard for the fact that the

Abenakis were in fact occupying the Missisquoi region and that Missisquoi had always been Indian land.

Nor does the decision address the central issue in this case – whether there was an extinguishment at the site of the fishing.[7] The Vermont Supreme Court's theory of extinguishment is premised upon its conclusion that at the time of Vermont's admission, Congress understood that the Wentworth grants required, and the grantees had secured actual possession of the granted areas and were cultivating those areas. Yet the decision fails to state how Congress could have intended to extinguish aboriginal rights at the site where Petitioners were fishing when, in 1791 and thereafter, that site was in the middle of the Abenaki central village. App. B 9, 13, 20, 21.

REASONS FOR GRANTING THE WRIT

The case is important because it raises the issue of whether a series of political events, none of which pretend to impair aboriginal title, can cumulatively be deemed to extinguish such title. The decision is directly contrary to the holdings of this Court which analyze the criteria for extinguishment of aboriginal title.

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[7] The Court did not disturb the trial court's finding that the Missisquoi Abenaki Tribe had exclusive use and occupancy of Missisquoi relative to other Native Americans and thereby had aboriginal title to its ancestral homeland. Nor did the decision disturb the trial court's holding that the State had the burden of proof on the issue of extinguishment. Finally, the decision assumes "for purposes of this case that the defendants are members of a bona fide tribe of Native Americans." App. A 11.

A. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULINGS THAT AN EXTINGUISHMENT OF ABORIGINAL TITLE REQUIRES A CLEAR AND UNAMBIGUOUS ACT OF CONGRESS

The decision below holds that even in the absence of *any* specific evidence of Congressional intent to extinguish aboriginal title, an extinguishment can be premised on the cumulative effect of those events which lead to the creation of a state, the affirmation of that state's boundaries and the release of competing territorial claims by neighboring states. That is not the law.

What is striking about the Court's review of events leading to Vermont's admission to the Union is how little is said about the Missisquoi Abenaki Indians, their lands, their aboriginal right to fish and the particular site where Petitioners were fishing. The Court's theory of extinguishment, based upon the "increasing weight of history", violates this Court's holdings with respect to both the legal standard for extinguishment and the type of evidence required to demonstrate that an extinguishment has in fact been intended by Congress.

The rules governing aboriginal title and its extinguishment have been well established in a long line of cases starting with the 1823 decision in *Johnson v. McIntosh*, 21 Wheat. 543 (1823) and culminating in the 1985 decision in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("Oneida II").

These and many other decisions of this Court established the federal rule that the European nations who

claimed sovereignty over North America held fee title to the land subject to the Indians' right of occupancy and use of their aboriginal lands. Consequently, only the European sovereign had authority to purchase or otherwise terminate or "extinguish" Indian title. *Id.* at 234-35.

The standards for extinguishment reflect this Nation's long standing doctrine of protection of Indian lands. This Court has established a two pronged test for extinguishment:

First, extinguishment can only be accomplished by the sovereign. A conveyance of Indian land without the sovereign's consent is void *ab initio. Id.* at 245. Under the Constitution, only Congress has the power to extinguish Indian title. Prior to the formation of the United States, the power to extinguish rested with the Crown. *Id.* at 235, 247-49.

Second, an extinguishment of aboriginal title will not be lightly implied.[8] *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 354 (1941). In *Oneida II*, the Court further described this standard: "Most importantly, the Court has held that Congressional intent to extinguish Indian title must be plain and unambiguous." *Oneida II, supra,* at 247-48.[9]

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[8] This principle is analogous to rules of construction "deeply rooted in this Court's Indian jurisprudence", *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 60 U.S.L.W. 4067, 4072 (1992), that treaties and statutes are to be liberally construed in favor of the Indians with "ambiguous provisions interpreted to their benefit." *Oneida II*, supra, at 247; *County of Yakima*, supra, at 4072.

[9] The Court has been especially protective of Indian fishing rights. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Tulee v. Washington*, 315 U.S. 681 (1942) (prohibiting the imposition of a state license fee for fishing by the Indians).

In instances in which this Court has applied these principles, it has examined the language of particular statutes or other Congressional action to determine the intent of Congress. In each case, the Court has focused on particular Congressional actions with respect to particular Indian lands. See e.g., *Oneida II, supra, United States v. Santa Fe Pacific R. Co., supra, United States v. Alcea Band of Tillamooks,* 329 U.S. 40 (1946).

The decision of the Vermont Supreme Court violates this approach. While conceding "that the period preceding Vermont's Statehood was a confusing era", characterized by a "tumultuous political context", the decision concludes that Congress both understood and intended that the events leading to Vermont's admission to the United States would extinguish aboriginal title in Missisquoi.[10] App. A 23, 27, 28. Yet the Court's review of those

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[10] There is no hint in the Record or in the Court's decision that the political ramifications of the Wentworth grants were focused on Missisquoi. In fact, the opposite is true, given the dearth of European settlement in this remote region of northwestern Vermont even into the 1790's.

It is important to note that the Vermont Supreme Court's decision is confusing in a material respect. The decision discusses the St. Albans, Highgate and Swanton grants made by Governor Wentworth and immediately proceeds into a detailed discussion of the political events which followed the issuance of the Wentworth grants. What the decision fails to clarify is that the three grants which fall within the Missisquoi territory are but three of the 129 made by Governor Wentworth throughout Vermont during the period from 1752 to 1764. The result is simultaneously confusing but important. The reader of the Vermont Supreme Court's decision can easily assume that the discussion of the political consequences of the Wentworth grants refers solely to the St. Albans, Highgate and Swanton grants and

events shows only that Congress was concerned about eliminating disputes between Vermont and its neighboring states. See *Vermont v. New Hampshire*, 289 U.S. 593 (1933). The Court's historical review fails to show facts from which Congress could discern or ratify an intent to extinguish aboriginal title by either the Crown or the non-sovereign Republic of Vermont.

Aboriginal rights in Missisquoi were certainly not extinguished during the period of British rule or during the period of disputed sovereignty. Indeed, aboriginal rights were affirmatively protected by the British Crown. During the period of disputed sovereignty, the Republic of Vermont lacked the authority to extinguish aboriginal title.[11] Moreover, the proponents of the Republic took no adverse action directed at Abenaki lands. The trial court's undisturbed findings repeatedly point to continued Abenaki use and occupancy of Missisquoi throughout the period leading to Vermont's admission to the Union and thereafter.

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that the various authorities who were concerned with the grants were focused on those three. Clearly that is not the case.

[11] Sovereignty over Vermont passed directly from Great Britain to the United States. App. A 8-9. "For land located within the area of the original colonies, the fee title is in the State in which the land is located, since the State succeeded to the English claims upon independence. Outside of the territory of the original thirteen states the fee is held by the United States." F. Cohen, Handbook of Federal Indian Law at 489 (citations omitted). Even in the original states, Indian occupancy was protected by Federal law and termination rested exclusively with the Federal Government. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).

Far from showing a plain and unambiguous intent to extinguish the Abenaki's aboriginal title, the Record reflects facts and circumstances which indicate that Congress did not intend to impair the aboriginal title of the Abenakis. In 1791, the Abenakis were living openly and peacefully in Missisquoi. Their central village was in place and well known. App. B 13.

The 1791 Act of Admission, cited by the Vermont Supreme Court, is silent on the issue of Indians. The same is true of both the legislation which accompanied Vermont's admission and the legislative history of the Act of Admission, upon which the decision so heavily relies. App. H.

The year before Vermont was admitted to the United States, Congress passed the first Indian Trade and Nonintercourse Act, ch. 33, 1 Stat 138. That Act codified the well established federal law principle that "a sovereign act was required to extinguish aboriginal title . . . ". *Oneida II* at 245. This legislation demonstrates Congressional sensitivity to the rights of Indians at the very time of Vermont's admission to the Union.

In short, neither the facts of this case nor the decision's "increasing weight of history" doctrine can be reconciled with this Court's fundamental requirement that Congressional intent to extinguish aboriginal title must be "plain and unambiguous", *Oneida II* at 247-48, and "cannot be lightly implied." *United States v. Santa Fe Pacific R. Co., supra,* at 354.

Finally, the decision cannot withstand analysis even on its own terms. The decision concludes that it was Congress' understanding and intent that aboriginal title

would be extinguished in those areas where Wentworth grantees had settled and cultivated the land prior to Statehood. App. A 17-18, 26-27. Under the Court's reasoning, land which had *not* been settled and cultivated by a Wentworth grantee prior to 1791 would not have qualified for extinguishment and would be subject to the Abenaki's aboriginal title. Those are precisely the facts with respect to the fishing site which gave rise to this case. Under these circumstances, the decision below should be reversed.

B. THE VERMONT SUPREME COURT VIOLATED PETITIONERS' DUE PROCESS RIGHTS BY RELYING ON EVIDENCE NOT INTRODUCED AT TRIAL

The Vermont Supreme Court's historical review was the cornerstone of its decision. In assessing the historical events, the decision repeatedly cites to and relies upon historical "facts" which are not part of the Record. These facts are drawn from historical treatises, each with its own biases and perceptions. See e.g. App. A 15 (O'Callaghan), (Orton), 17 (Morrissey), 22 (Orton).

Use of these extraneous materials do not merely place historical events in "context" or simply provide "perspective." App. A 11. As the decision below demonstrates, this is a case about history. Distinguished historians testified for the Petitioners. There was ample documentary historical evidence, almost all of it contemporaneous to the period in question. Disputes over the admission of historical documents were hard fought in the trial court and resolved in accordance with the Rules

of Evidence. By going outside the Record, the Vermont Supreme Court in effect "retried" the case, introducing new facts without the benefit of the adversary process.

Had they been given the opportunity to object to or rebut the sources relied upon in the decision, Petitioners would have been able to clarify the geographic limitations of the "events" cited by these sources or to have offered evidence which rebuts, explains or modifies their conclusions. Certainly, the Vermont Supreme Court drew conclusions from these outside sources which are contrary to the findings of the trial court. Particularly in the context of a criminal case, the decision's reliance on sources which were not of Record violates due process. See generally, *Bowman Transportation, Inc. v. Arkansas Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

CONCLUSION

Petitioners respectfully urge this Court to grant this Petition, and reverse the Vermont Supreme Court's denial of Petitioners' motion to dismiss.

DATED: November 18, 1992.

Respectfully submitted,

NEIL H. MICKENBERG
Counsel of Record
MICKENBERG, DUNN, SIROTKIN
& DORSCH
P.O. Box 406, 29 Pine Street
Burlington, Vermont 05402
Telephone: (802) 658-6951

Attorneys for Petitioners

ENTRY ORDER

[VERMONT] SUPREME COURT
DOCKET NO. 90-512

OCTOBER TERM, 1991

State of Vermont	)	APPEALED FROM:
	)	
v.	)	District Court of Vermont,
	)	Unit No. 2, Franklin Circuit
Raleigh Elliott, et al.	)	
	)	DOCKET NO. 014459, 014485,
	)	014490, 014482

(Filed Jun. 12, 1992)

In the above entitled cause the Clerk will enter:

Reversed and remanded for further proceedings.

FOR THE COURT:

/s/ James L. Morse
James L. Morse,
Associate Justice

Concurring:

/s/ Frederic W. Allen
Frederic W. Allen,
Chief Justice

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

[ ] Publish

[ ] Do Not Publish

/s/ Albert W. Barney
Albert W. Barney,
Chief Justice (Ret.),
Specially Assigned

/s/ Louis P. Peck
Louis P. Peck,
Associate Justice (Ret.),
Specially Assigned

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

No. 90-512

State of Vermont
v.
Raleigh Elliott, et al.

Supreme Court

On Appeal from District Court of Vermont, Unit No. 2, Franklin Circuit

October Term, 1991

Joseph J. Wolchik, J.

Jeffrey L. Amestoy, Attorney General, William E. Griffin, Chief Assistant Attorney General, and Susan R. Harritt, Assistant Attorney General, Montpelier, for plaintiff-appellant

Gabor Rona of Rubin, Rona, Kidney & Myer, Barre, and Neil Mickenberg of Mickenberg, Dunn, Sirotkin & Dorsch, Burlington, for defendants-appellees

PRESENT: Allen, C.J., Gibson and Morse. JJ., and Barney, C.J. (Ret.) and Peck, J., (Ret.), Specially Assigned

MORSE, J. Defendants are individuals in a group of thirty-six people who were charged with fishing without a license under 10 V.S.A. §§ 4251(a), 4266. The cases arose

primarily from an October 18, 1987 "fish-in" demonstration and were consolidated for trial. Before trial, defendants moved to dismiss based on the doctrine of "aboriginal rights." They claimed the doctrine prohibited the prosecution of Native Americans if they were members of a currently viable Indian tribe which had from "time immemorial" continuously occupied the land where the offenses occurred. According to defendants, because they held "aboriginal title" to the land, they were not subject to state regulation for fishing without a license.[1]

The trial court agreed and dismissed the charges against most of the defendants because they were members of the Missisquoi Tribe, a subpart of the western Abenaki Tribe whose aboriginal title had not been extinguished. The State took an interlocutory appeal, arguing that the Abenakis (as we shall refer to them for purposes of this opinion) are no longer a tribe, and, even if they are, any aboriginal title to the land was extinguished by governmental action long ago. We agree that aboriginal rights were extinguished and, accordingly, reverse.

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[1] Defendants' position might have been based on the exception to state fishing licensing requirements under 10 V.S.A. § 4253(a), allowing a person to fish without a license on land owned by the person. The court ruled, however, on a broader basis that the state's regulation of fishing impermissibly infringed on aboriginal rights. The State did not challenge the court's holding in this respect except on the ground that aboriginal rights did not exist. We therefore express no opinion on whether the state may regulate lands subject to aboriginal title.

I.

"Aboriginal title" gives members of a viable Native American[2] tribe a right of occupancy to lands that is protected against claims by anyone else unless the tribe abandons the lands or the sovereign extinguishes the right. *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 345-47 (1941). The right arises from a tribe's occupation of a definable, ancestral homeland before the onset of European colonization. The occupation must have been exclusive of the occupation by other tribes. *Sante Fe*, 314 U.S. at 345. The validity of aboriginal title is not dependent on treaty, statute, or other formal governmental recognition, *Cramer v. United States*, 261 U.S. 219, 229 (1923), but a group making a claim under the doctrine must present sufficient proof that they have constituted a tribe throughout relevant history and have never voluntarily abandoned their tribal status. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 586-587 (1st Cir. 1979).

This property concept flowed from the "doctrine of discovery," which in turn, derived from natural law. See F. Cohen, *Handbook of Federal Indian Law* 486 n.128 (1982). The discovery doctrine was recognized by European countries during the colonization of North America. During the territorial expansion of the sixteenth, seventeenth,

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[2] We recognize the controversy surrounding terminology used to identify the original occupants of this country. With all due respect to this issue, we refer to these individuals as Native Americans throughout much of this opinion, but because many of the cases with which we deal use the term "Indians," we will, for the sake of clarity, occasionally use that term to denote "Native Americans."

and eighteenth centuries, European governments reconciled their claims to newly acquired lands with claims of other European governments and the aboriginals who were already occupying the lands. *Id.* at 486-87. As a result of these compromises, it was generally understood that a discovering nation – the European government whose arrival was first in time – held title to lands "subject to the Indians' right of occupancy and use." *Id.*; *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234 (1985) [*Oneida II*]; see also Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D.L. Rev. 73, 75-87 (1988). Hence, the phrase "aboriginal title" or "Indian title" describes the ownership interest retained by Native Americans in lands which European nations appropriated. *Id.* at 75-78.

The United States Supreme Court adopted the doctrine in *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 592 (1823). In that case and later, the Court applied the doctrine by "assigning dual, or split, property rights to the discoverer nation on the one hand, and Indian nations on the other." Norgren, *supra* at 85. As caselaw developed, it became clear that discovering nations did not hold fee simple absolute because their interest was encumbered by the occupancy rights held by Native Americans. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 758 (1835). The interest that the discovering nation did hold, however, significantly impaired the rights of the original inhabitants because the discoverer had the " 'exclusive right . . . to appropriate the lands occupied by the Indians,' " Norgren, *supra*, at 90 (quoting *Johnson*, 21 U.S. at 584), and could terminate aboriginal rights at any time. *Santa Fe*, 314 U.S. at 347.

Although the doctrine of aboriginal rights is long standing, *Oneida II*, 470 U.S. at 234, the nature of the various interests in aboriginal lands has not been easily defined or applied. A sovereign's transfer of such land is subject to continuing Indian rights of occupancy and use, until those underlying rights are extinguished. Cohen, *supra*, at 489. The interest transferred is termed the "naked fee." *Id.* Absolute ownership does not vest until Indian title is extinguished, a phenomenon that cannot occur without the act or consent of the sovereign. *Id.* at 487. Therefore, where the terms of a land grant do not rise to the level of extinguishment, or where there has been no action by the sovereign demonstrating an intent to extinguish, the grant of land conveys only an inchoate interest in the land. *United States v. Cook*, 86 U.S. (19 Wall) 591, 594 (1873) (analogizing Indian title to the interest held by a tenant for life, stating that "[w]hat a tenant for life may do upon the lands of a remainderman the Indians may do upon their reservations, but no more").

II.

Indian title may be abolished, or "extinguished," causing the Native Americans to lose their right of occupancy and use, and vesting fee simple absolute in either the sovereign or a third party. *Johnson*, 21 U.S. at 592. Extinguishment differs from a transfer of the naked fee, because when the former occurs, no rights are left in the Indians. Extinguishment may be accomplished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *Santa Fe*, 314 U.S. at 347.

Even though aboriginal title has been deemed "as sacred as the fee simple of the whites," *Mitchel*, 34 U.S. (9 Pet.) 711, 746 (1835), it may nevertheless be taken without compensation. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). The federal policy is that extinguishment occur through negotiation rather than by force, but an extinguishment by force is valid. See *United Sates v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976) (extinguishment need not be accomplished by treaty or voluntary cession because the "relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights, not whether the revocation was effected by permissible means"). The manner, time, and conditions of extinguishment are determined by the sovereign. *Buttz v. Northern Pacific R.R.*, 119 U.S. 55, 66 (1886). Extinguishment is irrevocable; once it takes place. Indian title cannot be revived.[3]

Before the American Revolution, Great Britain held the power to extinguish aboriginal rights in in [sic] the colonies. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1150 (2nd Cir. 1988) [*Oneida III*]. The right to extinguish may pass to succeeding sovereigns,

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[3] Observers have regarded the rule of law permitting extinguishment of aboriginal rights with skepticism. In legal discourse the act of extinguishment requires no standard to justify it, and methods used to extinguish aboriginal rights are not justiciable. *Santa Fe*, 314 U.S. at 347 ("justness [of extinguishment] is not open to inquiry in the courts"); *Buttz v. Northern Pacific Railroad*, 119 U.S. at 66 (1886) (same). See Norgren, *supra*, at 90-91 (criticizing early caselaw for "[u]sing legal concepts alien to tribal law" to build "a theory of land title sympathetic to the interest of the Republic" and for creating "a muddle of possessory rights versus ultimate property rights").

and with the adoption of the federal constitution, the right to extinguish became the exclusive right of the federal government. *Santa Fe,* 314 U.S. at 347. Sovereign intent to extinguish need not be express, but there must be evidence that demonstrates a "plain and unambiguous" intent to extinguish exclusive aboriginal rights. *Oneida II,* 470 U.S. at 248. Because of the federal policy to respect Indian rights of occupancy, the intent to extinguish Indian title will not be " 'lightly implied.' " *Id.* at 247-48 (quoting *Santa Fe,* 314 U.S. at 346).

A historical event, although insufficient by itself to establish an extinguishment, may contribute to a finding of extinguishment when analyzed together with other events. *Gemmill,* 535 F.2d at 1148 (ambiguity in single act of federal government is not fatal to claim of extinguishment when series of subsequent acts resolves ambiguity to demonstrate extinguishment); *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1391-92 (Ct. Cl. 1975) (inclusion of aboriginal lands in forest reserve and federal grazing district, as well as conveyances made to various grantees at different times, was evidence supporting a finding of extinguishment of Indian title).

Moreover, a century-long course of conduct may demonstrate extinguishment, even though the exact date on which Indian title is extinguished is difficult to determine. *Gemmill,* 535 F.2d at 1149; see also *Ildefonso,* 513 F.2d at 1390 ("there are no fine spun or precise formulas for determining the end of aboriginal ownership").

As seen from our discussion so far, the doctrine of Indian title and its extinguishment lacks precision in delineating between competing interests. See Norgren,

supra, at 85, 90 (describing the Supreme Court's "lexicon of tribal property rights" both as political "brilliant compromise" and as "judicial mythology" which rationalized the origin of land titles in the United States). Although the doctrine has not been applied in a cohesive manner, "every court considering the doctrine of discovery reaffirmed its basic tenets." Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, Hastings L. J. 1215, 1226 (1980). The essential test requiring sovereign consent to extinguish aboriginal rights has remained intact since its adoption in *Johnson*. In our analysis, we endeavor to apply these principles.

III.

During lengthy hearings at the trial level, defendants offered expert testimony on the origins, duration, and quality of Abenaki presence in the "Missisquoi" area, and on the nature and continuity of tribal status from the beginning of Abenaki presence to date. The State countered that the defendants offered insufficient proof of uninterrupted tribal existence and that, if tribal status did trigger aboriginal rights to the land, those rights had been extinguished.

The court was presented with voluminous evidence on the contested issues, and although we disagree with it on the points of law, the court's findings and conclusions are indicative of an exhaustive effort to reach just results in this case. In extensive and meticulous findings, the court described the settlement of Abenakis in northwest Vermont in 9,300 B.C. and occupation of the area as an intact tribe from that date to the present. The court based

its findings of tribalness on evidence of Abenaki culture, governance, and familial tradition. According to the court, genealogical, ethnological, and archeological evidence proved uninterrupted tribal presence and ethnic continuity. The court also concluded that the State

> failed to prove by the preponderance of the evidence that the Missisquoi abandoned or ceded their Missisquoi homeland or that their aboriginal rights were extinguished by either an express act or an act clearly and unambiguously implying any sovereign's intent to extinguish those rights. Accordingly, the Missisquoi's aboriginal right to fish in their Missisquoi homeland continues to exist today.

We do not decide whether the trial court ruled correctly on the issue of tribal status and assume for the purposes of this case that defendants are members of a bona fide tribe of Native Americans. We conclude, however, that a series of historical events, beginning with the Wentworth Grants of 1763, and ending with Vermont's admission to the Union in 1791, extinguished the aboriginal rights claimed here.

IV.

In deciding the issue of extinguishment, we first place the pertinent historical facts in context. Although historical scholarship may be based on conflicting interpretations of recorded history, we briefly recite the political backdrop against which European settlement was set, in order to put into perspective the events leading to the extinguishment of the Abenakis' aboriginal rights to the land at issue.

A.

The area covering what is now the states of New York, New Hampshire and Vermont was colonized in the seventeenth century by European settlers. The English had full control of the New York area by 1669. New Hampshire was also colonized by the English, and was officially under British rule as a royal province by 1679. After the American Revolution, the New York and New Hampshire colonies (also known as provinces) were admitted as two of the thirteen original states in 1788.

The Abenaki occupied what is now northwestern Vermont long before white presence began in the area in 1609 with the arrival of Samuel de Champlain. See 1 W. Crockett. *Vermont: the Green Mountain State* 31-32 (1921); see also generally, S. Morison, *Samuel de Champlain, Father of New France* 89-122 (1972). In 1724, Dutch settlers established a community in southern Vermont. After the British won the French and Indian War (1754-63), the land was opened for further European settlement. When the American Revolution began in 1775, approximately 20,000 people lived in what is now the State of Vermont.

B.

As provinces, New York and New Hampshire were administered on behalf of the Crown by royal governors authorized to grant, "for and in the name of the King, any unchartered lands in [their] province." H. Hall, *Early History of Vermont* 8 (1868). The Crown, however, retained full control over boundaries, and could enlarge or contract them at will. *Id.* The first significant historical event

relevant to extinguishment of Abenaki aboriginal title was the royal grant of lands to European settlers in the area claimed by the Abenakis in this case. On August 17, 1763, Royal Governor Benning Wentworth of New Hampshire made land grants in the areas now known as St. Albans, Highgate and Swanton. Continued ownership was conditional: without actual settlement and cultivation of the lands, title would revert to the British Crown.[4]

During this period, the Crown attempted to maintain peaceful relations with the Indians by issuing a number of orders in the early 1760's designed to avoid conflicts over land between Indians and Europeans. For example, in 1761, the Crown released a "Royal Instruction" to the colonial governors prohibiting them from making grants of land occupied by Indians without specific authority from the Crown, and requiring European settlers to remove themselves from territories not properly obtained.[5] In 1763, the Crown issued a "Royal Proclamation," once again forbidding colonial settlement on

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[4] For example, the Highgate grant, in language common to all three grants, stated

> [t]hat every Grantee, his heirs or Assigns shall plant and cultivate five Acres of Land within the Term of five Years for every fifty Acres contained in his or their Share or Proportion of Land in said Township, and continue to improve and settle the same by additional Cultivations, on Penalty of the Forfeiture of his Grant or Share in the said Township, and of its reverting to Us, our Heirs and Successors, to be by Us or them Regranted to such of our Subjects as shall effectually settle and cultivate the same.

The New Hampshire Grants 221 (A. Batchellor ed. 1895).

[5] The Crown directed royal governors to prosecute settlers who had obtained "any lands within our said province upon

Indian-occupied lands and ordering settlers occupying Indian lands to abandon the properties.[6]

The Crown was also faced with conflicting land claims among the settlers. New York Governor Cadwallader Colden attempted to grant land that had already been granted by the New Hampshire Governor, claiming that Governor Wentworth had no authority to grant lands

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pretense of purchases made of the said Indians without a proper license first had and obtained either from us or any or [sic] our royal predecessors or any person acting under our authority." *Royal Instructions to British Colonial Governors 1760-1776*, 477-78 (L. Labaree ed. 1935).

[6] The Royal Proclamation of 1763 provided in relevant part:

> . . . Tribes of Indians . . . Should not be . . . disturbed in the Possession of such Parts of our . . . Territories as, not having been ceded to or purchased by US, are reserved to them, or any of them, as their Hunting Grounds. We do therefore, . . . declare it to be our Royal Will and Pleasure . . . that no Governor . . . in America . . . grant Warrants of Survey, or pass Patents for any Lands . . . or upon any lands whatever, which, not having been ceded to or purchased by US as aforesaid, are reserved to the said Indians, ...
>
> And, We . . . strictly forbid . . . all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.
>
> And, we do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands, which not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

in the Province of New York.[7] In 1764, the Crown responded to these disputes between the New Hampshire and New York governors by issuing a "Privy Council Order." This order stated that the Connecticut River was the mutual boundary between New York and New Hampshire, thereby clarifying each authority's respective jurisdiction and putting the Wentworth grants in the territory of New York. Ownership quarrels continued, however, and in 1767 the Wentworth grantees petitioned the Crown to halt the regranting of their lands by the New York Governor so that their patents could be "ratified and confirmed." 4 *Documentary History of the State of New York* 375-76 (E.B. O'Callaghan ed. 1851). In response, the Crown forbade New York to issue grants "whatever of any Part of the Lands described in the said Report, until his Majesty's further Pleasure shall be known concerning the same." *Id.* at 376. The Crown, however, stayed out of the dispute after issuing this order.

Conflict between New Hampshire claimants and New York authorities persisted. In 1769, the royal government of New York initiated the first in a series of ejectment suits in an attempt to remove the New Hampshire grantees from the land granted by New York. V. Orton, *Personal Observations on the Republic of Vermont*, 45 (1977). The New Hampshire grantees subsequently revolted against the New York authorities, and in the years between 1770 and 1775 settlers formed a militia called the

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[7] New York based its jurisdiction over the disputed area on a 1674 grant by King Charles II to the Duke of York, who later became King James II. *Vermont v. New Hampshire*, 289 U.S. 593, 598 (1933).

"Green Mountain Boys." Led by Ethan Allen, this group of claimants repulsed the "Yorkers" who tried to attain lands in Vermont. The rebellion prompted the decision to establish an independent government for the New Hampshire Grantees. C. Williamson, *Vermont in Quandary*: 1763-1825 7-23 (1949): see also *Vermont v. New Hampshire*, 289 U.S. 593, 607 (1933) (finding of special master that attempts by New York authorities to interfere with holdings of New Hampshire grantees "led to protest and forcible resistance which assumed the proportions of a revolutionary movement").

Consequently, in January 1777, Vermont declared its independence as a "Republic." By this declaration, Vermont rejected all governing authority except its own. The preamble to the document in which Vermont announced its autonomy from New York and British rule, as well as that of the rest of the world, asserted Vermont's dominion over the lands granted by Governor Wentworth:

> And whereas, the territory which now comprehends the State of Vermont, did antecedently, of right, belong to the government of New Hampshire; and the former Governor thereof, viz. his excellency Benning Wentworth, Esq., granted many charters of lands and corporations, within this State, to the present inhabitants and others.

Vt. Const., preamble. (1777).

The New Hampshire grantees, now Vermonters, defied any authority that threatened their ownership rights to land in the Republic of Vermont. Ethan Allen's statement to invaders holding "re-granted" New York title to land claimed by the New Hampshire grantees

expressed absolute and unyielding defiance. After expelling intruders from New York with the assistance of 300 members of the Green Mountain Boys, Allen challenged the intruders to "[g]o . . . and complain to that damned scoundrel your Governor. God damn your Governor, Laws, King, Council, and Assembly." C. Morrissey, *Vermont: a [sic] Bicentennial History* 83 (1981).

Before Vermont's admission to the union as the fourteenth state, statements made on behalf of the self-proclaimed "Republic" and the federal Congress shed light on the understanding held by both Vermont and Congress as to who had rights to the territory of Vermont. In 1781, during negotiations for admission to the union, Vermont was called upon to clarify in writing the status of the Wentworth Grants in order to confirm fulfillment of the settlement conditions. A committee of Congress submitted questions to the Vermont delegates, who explained that none of the grants had been forfeited due to nonsettlement, and that, although settlement had not been completed, they intended to fulfill all the conditions.[8]

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[8] 2 Records of the Governor and Council of the State of Vermont, 318-19 (1874) read as follows:

> **Query 3d.** What are the ideas of the people of Vermont relative to the claim of private property, under grants or patents from New-Hampshire, or New-York, previous to the present revolution?
> **Answer.** Altho' the State of Vermont hath not, hitherto, authorized any court to take cognizance of such causes, as respect titles of lands, nevertheless, they have had, and still have it in contemplation to adopt such modes, as the circumstances, arising out of each case, may justify, without adhering to the strict rules of law.

Hence, the early Vermonters took steps to confirm their entitlement by ensuring fulfillment of the Wentworth conditions.

Vermont's constitution established a single governing body called the "General Assembly" with "exclusive and supreme legislative powers." P. Merrill, *Vermont Under Four Flags: A History of the Green Mountain State* 1635-1975, 21 (1975). In 1783, pursuant to this legislative authority, Vermont set a timetable for settlement previously hindered by the American Revolution. The Legislature provided that May 1, 1784, would be the "lawful Time to begin settlement of New Lands." Act Declaring Time When to Begin Settlement (1783).

Finally, during the admission negotiations, Congress obliged the Vermont authorities to relinquish only those claims covering territory that is now New Hampshire, as opposed to any lands granted by Wentworth in what is now Vermont. Congressional Res. (Aug. 20-21, 1781) ("it [shall] be an indispensable preliminary to the recognition of the independence of the people inhabiting the territory called Vermont, and their admission into the federal union, that they explicitly relinquish all demands of lands or jurisdiction on the east side of the west bank of the

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Query 4th. What are the intentions of your constituents, in regard to the patents that were granted on conditions of settlement within a given time, and which have been prevented by the claims of the people of Vermont, and the present revolution? **Answer.** No forfeitures have been taken by the State of Vermont, on any such grant, for non-performance of conditions of Settlement, and we conceive it to be the intention of our constituents to grant a further reasonable time for fulfilling such conditions.

Connecticut River"). Congressional resolutions recognized that Vermont's northern boundary extended to the forty-fifth degree of northern latitude. *Vermont v. New Hampshire,* 289 U.S. at 610-11. During the last decade of the 1700's, as an additional requirement to federal admission, Vermont paid New York $30,000 "for the relinquishment of all claims of sovereignty by New York, and for the confirmation of the New Hampshire township grants." *Id.* at 611. In 1791, Congress admitted Vermont to the Union on the basis of these boundary delineations. Act Admitting Vermont into the Union (1791); see also *Vermont v. New Hampshire,* 289 U.S. at 613 (delineation of boundary between Vermont and New Hampshire clarified by construing resolution of Congress under which Vermont was admitted to statehood).

V.

The trial court examined the events leading to Vermont's statehood and concluded that no single event constituted express or implied termination of aboriginal rights. The court declined to decide whether the grants were within Wentworth's geographical jurisdiction, but stated that the New Hampshire Grants were beyond Governor Wentworth's authority as delimited by the Crown's policy to protect the rights of Native Americans. The court cited the Royal Instructions, Proclamations, and other historical evidence in finding that the Grants, being inconsistent with the aboriginal right of occupancy, were either invalid, or, in the alternative, conveyed only the "naked fee". The court also stated that Vermont's 1777 Constitution and subsequent admission to the Union did not accomplish an extinguishment of aboriginal rights. As

a result, according to the trial court, the State failed to satisfy its burden of showing, by a preponderance of the evidence, a "clear and unambiguous intent to extinguish" aboriginal rights. For the reasons that follow, we disagree.

A.

We differ with the trial court principally in its application of the test for extinguishment to discrete events in Vermont's history, rather than to the cumulative effect of many historical events. The legal standard does not require that extinguishment spring full blown from a single telling event. Extinguishment may be established by the increasing weight of history.

Governor Wentworth's grants of the lands at issue may not have been authorized by the Crown, but any *ultra vires* exercise of power by him does not detract from the vast political changes it inspired. These grants triggered the emergence of Vermont for a short time in history as an entity separate from the authority of Great Britain and its provinces of New Hampshire and New York, or any other government. A drastic realignment of jurisdictional boundaries was induced by Wentworth's Grants. Appreciation of the various authorities' conduct toward the area that is now the State of Vermont is critical to our determination that intent to extinguish became unquestionable. The Crown's sanctioning of European dominion over the area, the zeal with which the founders of the "Republic" of Vermont protected the New Hampshire Grants, and the negotiations with Congress in anticipation of Vermont joining the Union remove any doubt

that extinguishment of Abenaki aboriginal title was complete by 1791, when Vermont became the fourteenth state.

1.

Defendants rely on the court's finding that the grants were invalid because they violated the Crown's Native American policy, and contend that the New Hampshire Governor had no jurisdiction to grant lands in what was then the Province of New York. While the Crown may have declared the grants invalid based on a lack of jurisdictional authority in this particular governor, the Sovereign's intent to allow British appropriation of the area was not in question. Despite earlier royal statements, the Crown's conduct sanctioned European appropriation. Indeed, the Crown was given opportunities to prevent European settlement to preserve aboriginal rights during disputes between New York and New Hampshire over the Wentworth Grants. Instead, the Crown maintained the status quo, advancing the interests of European settlement in contravention of its earlier policy statements about preserving Indian occupation.

The Crown's Privy Council Order of 1764 stated that the boundary between New York and New Hampshire was the eastern bank of the Connecticut River. *Vermont v. New Hampshire*, 289 U.S. at 596. Historians interpret this as reflecting the Crown's intent to protect the interest of the New York authorities in the land. H. Hall, *Geography and History of Vermont* 106 (1871). The Crown's mandate giving New York jurisdiction over the grants prompted New York to require the inhabitants to repurchase the land, or risk the prospect of removal by New York

authorities. *Id.* Ironically, when the Wentworth grantees complained that New York authorities were wrongly attempting to remove them, the Crown responded in 1767 by ordering New York to halt making grants.

Both the 1764 and the 1767 Royal Orders manifest an intention to pacify the two British jurisdictions, not protect Native Americans. The Royal Instruction of 1761 and the Royal Proclamation of 1763 proved to be paper tigers. New Hampshire Grantees were not dispossessed of the land or removed at the Crown's direction because Wentworth may have exceeded his prerogatives in conveying land occupied by Native Americans. After 1763, the Crown did not retract any authority to make grants in order to protect the aboriginal occupants in this area, but instead merely attempted, as the trial court stated, to end the two provinces' dispute over who had jurisdiction. See *The New Hampshire Grants* vii (A. Batchellor ed. 1895).

The question was whether New York or the New Hampshire Grantees had the right to assert dominion over the lands, not whether dominion over the land could be asserted at all by any European settlers. The necessary and inevitable outcome of the Crown's position would still be that Europeans would appropriate the area, especially since settlement of the lands was a British goal during this time. Orton, *supra*, at 35. These events are evidence of increasing European dominion adverse to the use and occupation of the Indians, to which the Crown impliedly consented.

We agree with defendants that non-Indian, or "white," encroachment causing Indian withdrawal is not, in itself, effective to extinguish aboriginal rights. See

Ildefonso, 513 F.2d at 1389 ("bare expectation" of white settlement does not amount to an intent to extinguish). We do, however, include the phenomenon of white settlement in our analysis as evidence of an intent to extinguish by the assertion of dominion over the area. This is because "[m]aking lands available for white settlement . . . in an appropriate factual context, constitute[s] termination of aboriginal ownership." *Id.*; see also *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1391 (Ct. Cl. 1974) (authorized white settlement is one factor in determining when Indian title ceased and " 'in an appropriate factual context' the opening up of an area for settlement can be tantamount to the ending of aboriginal title over the whole region"). Here, there was much more than "expectation." There was actual settlement and appropriation to the exclusion of other competing claims, and ratification by Congress when it admitted Vermont to the Union. Defendant's claims that the Abenakis never voluntarily abandoned the area and that they were never completely removed have no effect on a finding of an intent to assert complete control over the area in a manner adverse to the Abenakis.[9]

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[9] The actions of the sovereign, as opposed to the Indian response to it, determine whether or not there was the requisite "intent" to extinguish, but we view Indian conduct during this time as relevant because it shows the effect of the assertion of dominion by the Europeans on the Abenakis. Although, in general, Abenakis continued to occupy Vermont during this period, the changing nature of their presence reflects the tribe's response to the various events that occurred in the years leading to Vermont's admission to the Union. Until the first European contact in the early seventeenth century, no other tribe inhabited the Missisquoi homeland. There is evidence, however, of

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We also disagree with the trial court's assessment of Vermont's 1777 Constitution and the events that led to it. The court did not analyze the period of Vermont's independence as a part of the continuum leading to extinguishment. Instead, the court discarded this history as merely an expression of the "naked fee" doctrine, stating that even if the Wentworth Grants were valid, they were made subject to Native American occupancy rights:

> Although it is true that the Vermont Constitution recognizes the Wentworth Grants as a valid basis for land claims in Vermont, this *in itself*, does not accomplish extinguishment. The Wentworth Grants were made subject to aboriginal title and . . . there is nothing to indicate that Vermont's reaffirmation of these grants abrogated [Indian] rights. (Emphasis added.)

Without deciding whether Vermont legitimately achieved sovereignty, see J. Sweeney, C. Oliver and N. Leech, *The International Legal System* 851-929 (1988), we believe that the period from 1777 to 1791 provides continuity in the long standing appropriation of the area that

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Abenaki resistance to European settlement. In 1766, at a meeting in Isle La Motte, attended by the Governor of Quebec and the Governor of New York, the Missisquoi Tribe complained of settlers in the area and that during the years 1775 to 1785, the Missisquoi had lost control of choice farmland. There is also evidence that in 1786 the tribe, although for the most part peaceful, threatened the use of force against the European settlers. Despite this evidence, it appears that the Abenaki response was predominantly passive – evidenced by retreat and withdrawal. Tribal presence continued through to the 1790's, but the tribe no longer controlled the area.

had been granted by Wentworth. See Vt. Const., preamble (1777). More importantly, the New Hampshire grantees' representations to Congress characterized the Wentworth Grants as though they had been granted by legitimate means by Wentworth in 1763. See Records of the Governor and Council, *supra*, at 318-19.

Appellees also argue that the area in dispute was not within Vermont's boundaries, even if the state was a sovereign entity. They claim that the northern boundary of the Vermont Republic extended only as far as "what is now central Vermont." Vermont's boundary extended to the latitude of forty-five degrees north – the current northern boundary. *Vermont v. New Hampshire*, 289 U.S. at 610. Congress therefore understood and intended the cession of Missisquoi territory, the final event resulting in the extinguishment of aboriginal rights.

We are cognizant of the federal decisions holding that a grant not rising to the level of an extinguishment conveys the naked fee only, thereby preserving aboriginal occupancy rights. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43 (1810). Nevertheless, the trial court's conclusion that the Grants were insufficient to convey more than the naked fee, and that therefore, later events could not produce an extinguishment, is contrary to our view of the law as it applies to these facts. See, e.g., *Santa Fe*, 314 U.S. at 357-58 (grant made to Atlantic & Pacific Railroad Company conveyed the naked fee only, but later events clearly brought about an extinguishment because in this "historical setting," it could not be fairly implied that tribal rights were preserved).

The trial court failed to appreciate adequately the import of these particular land grants. More than mere ownership of the lands was at stake; these conveyances expressly required an assertion of dominion. The requirement that settlement and cultivation commence and continue in order to avoid forfeiture directly undermined competing aboriginal rights to the land. The land grants' contingencies were inimical to the right of use by anyone else. The New Hampshire grantees ardently relied upon their rights to the land by virtue of the grants, and their assertion of dominion over the area inspired Vermont's revolt against New York and its stance as an independent republic. See *State v. Kirchoff*, 156 Vt. 1, 17, 587 A.2d 988, 998 (1991) (Springer, D.J., Specially Assigned, concurring) (purpose of 1777 Vermont Constitution was to make clear that the claims of New York were invalid, therefore "[p]rotection of citizens' rights to security in their land was a key motivating force in creating" that document). In short, the relevant focus is on what Vermonters intended to do with the land, not what hindsight discloses Governor Wentworth was authorized to do with it.

An examination of what transpired when Vermont was admitted to the union further contradicts the notion that merely the naked fee was at stake. The 1791 Congress' understanding of the land disputes is clear from the preadmission negotiations and other legislation by which Vermont was admitted to the Union. See *Vermont v. New Hampshire*, 289 U.S. at 608-13 (describing the extensive pre-admission negotiations between Vermont and Congress). Upon Vermont's admission, Congress recognized the land claims based on the representations of the

grantees, which cannot be harmonized with the contention that the grantees possessed only the "naked fee." This limited property right "merely constitutes a reversionary interest that *becomes* possessory" upon extinguishment. Cohen, *supra*, at 489 (emphasis added). There is no doubt that Congress considered and intended the New Hampshire Grants, in 1791, to be possessory. See *Missouri, Kansas & Texas Railway v. Roberts*, 152 U.S. 114, 117 (1894) (even though grant of Indian lands to the State of Kansas did not expressly extinguish aboriginal rights, extinguishment could be implied because grant necessarily involved possession and "was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration").

Therefore, even if the grantees initially held only the "naked fee," their reversionary interest vested in 1791, and any question of ambiguity was resolved by the act of Congress admitting Vermont as the fourteenth state. See *Gemmill*, 535 F.2d at 1149 ("any ambiguity about extinguishment that may have remained after the establishment of the forest reserves has been decisively resolved by congressional payment of compensation to the Pit River Indians"); *Gila*, 494 F.2d at 1392-93 (in determining date of taking in order to compute compensation to Indians for loss of land, congressional act which authorized and ratified previous events may suffice as evidence of extinguishment); *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 947 (Ct. Cl. 1974) (establishment of reservation did not extinguish aboriginal title because there was no showing of proper congressional authorization).

We concede that the period preceding Vermont's Statehood was a confusing era, and that valid questions remain as to the legitimacy of the opposing governing entities. Nevertheless, the tumultuous political context does not preclude a finding of extinguishment. See *Ildefonso*, 513 F.2d at 1387 (occurrence of extinguishment analyzed in light of "the particular facts, circumstances and history" of the case (citing Santa Fe, 314 U.S. at 357-58)). Vermont's admission to the union provided closure to a long period of authority transferred from one body politic to another, giving final, official sanction to the previous events, and eliminating any remaining ambiguity about who had dominion over lands once controlled by the Abenakis. Short of an express statement declaring an intent to extinguish, it is difficult to imagine a demonstration of intent that could be more unequivocal than these cumulative events leading to statehood. We conclude that, by the year 1791, aboriginal rights to the area now known as St. Albans, Highgate and Swanton had been extinguished.

Reversed and remanded for further proceedings.

FOR THE COURT:

/s/ J. Morse
Associate Justice

STATE OF VERMONT
FRANKLIN COUNTY, SS.

VERMONT DISTRICT COURT
FRANKLIN CIRCUIT, UNIT #2
(Filed Aug 14, 1989)

STATE OF VERMONT	DOCKET NO. 1171-10-86Fcr
	1327-11-86Fcr
V.	15-1-87Fcr
	379-4-87Fcr
HAROLD ST. FRANCIS	
STATE OF VERMONT	DOCKET NO. 703-5-88Fcr
	752-6-87Fcr
V.	771-6-87Fcr
	1023-8-87Fcr
JOHN CHURCHILL	1045-8-87Fcr
STATE OF VERMONT	DOCKET NO. 937-7-88Fcr
V.	
HOMER ST. FRANCIS	
STATE OF VERMONT	DOCKET NO. (Fishing Without License)
V.	
HOMER ST. FRANCIS	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one, and of a complex character." *United States v. Kagama*, 118 U.S. 375, 381 (1985).

Introduction

Defendants' in their cases consolidated for hearing on Motions to Dismiss, ask for dismissal because of superceding [sic], ancient, tribal rights and/or for lack of jurisdiction. The bulk of these defendants are charged with either fishing without a licence [sic] or failing to show a license upon the request of a game warden. These Defendants seek dismissal on the ground that there has been no extinguishment of their alleged aboriginal right as members of the Missisquoi Abenaki tribe to fish in their aboriginal homeland. These same defendants join with the remaining defendants, who are charged with various crimes, claiming that the site of each charge is in "Indian Country" and, therefore, is not subject to state criminal jurisdiction.*

For the reasons set out below this court dismisses the charges against all but six[1] of the so-called "fish-in" defendants because it recognizes their claim to unextinguished aboriginal fishing rights. The court does not find that any of the charges occurred in Indian Country and does not dismiss any on that ground.

PRELIMINARY STATEMENT

The application of the "ultimate legal issue" standard discussed in *Riess v. A.O. Smith Corporation*, No. 87-012

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* Due to technical difficulties the court will designate footnotes in the text by "ftnt" or "Ftnt." depending on placement.

[1] There is insufficient evidence to find that Sylvia Wells, Tammy Lee Conger, Richard Rowe, Mark Rushlow, Raleigh Elliot or Joy Mashtare are members of the Missisquoi Abenaki tribe with Missisquoi Abenaki Ancestry.

(Vt. Nov 10, 1988) was left open at the close of the evidence for study by the court. The court concludes that where the *Riess* objection was made the expert witness was not testifying about the ultimate legal issue before the court. Even if the testimony was on such issue there is sufficient supporting testimony, tested by cross-examination, to support the findings made by the court without dependence on such testimony.

The court admitted Defendant's Exhibit U, an unsigned proclamation. The court now concludes that the document is irrelevant and excludes it.

The court initially excluded as irrelevant the State's Exhibit # 22 submitted in connection with the deposition of Dr. C. Calloway, An Act Regulating Fisheries, March 8th, 1787. 1787 Vt. Laws at 253. After further review the court concludes that the Act has some relevance and now admits the exhibit.

In the conclusions of law references to findings of fact are desginated [sic] "FF."

Acknowledgement

The undersigned Judge wishes to thank Susan Gilfillan, Esq., without whose scholarship, patience, energy and flexibility this decision would still be in its preliminary stages.

FINDINGS OF FACT

The facts found below are a distillate of six days of trial testimony of lay witnesses, police officers and

experts in anthropology and ethnology[2] and the deposition testimony admitted by stipulation of two experts in ethnology. All expert testimony is that of the defense; the State called only police officers. A large number and variety of exhibits, including maps and ancient documents, added valuable information. Neither here nor in the conclusions of law do we try to resolve the unresolvable questions, e.g. whether the Republic of Vermont ever was an independent nation. Those we leave for other tribunals at other times.

All found facts are anchored in particular testimony or exhibits. For the convenience of the close reader we provide source notes for virtually all of them, which translate as follows: T II at 12 means Volume II of the trial transcript at page 12; D at 11 means the Gordon Day deposition at page 11; C I at 6 means Volume I of the Colin Calloway deposition.

A. Missisquoi Abenakis: A continuing native American presence since time immemorial.

1. Over the last several decades researchers have recovered and literally unearthed documents and artifacts that have changed how even serious students of ethnology look at Vermont's native American population. For the longest time the most widely held opinion was that Indians never lived in Vermont, but new information has changed that notion. C III at 37, T I 132-133.

2. Historically, the Missisquoi Abenakis (Missisquois) are a group of Western Abenakis. D at 23.

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[2] Ethnology is a branch of anthropology concerned with the different branches of the human race. D at 11 at page 6.

3. The Missisquoi are one of several Western Abenaki tribes. The others include the St. Francis at Odanak, Quebec and the Penacooks of New Hampshire.

4. Western Abenakis inhabited primarily Vermont, New Hampshire, southern Quebec and western Maine. T I at 108.

5. The Eastern Abenaki, who inhabit a large part of Maine, differ primarily for the Western Abenaki linguistically. T I at 122.

6. Archaeologists have traced an essentially unbroken chain of evidence documenting Missisquoi presence in northwestern Vermont, back to 9300 B.C. They have found and examined extensive village sites, habitation and campsites and cemeteries. T I at 123-124.

7. Archaeological evidence exists that demonstrates the Missisquoi were farming in this homeland in the river flood plains at least as far back as 1123 A.D. T I at 163-164.

8. Up until first European contact no other tribe ever used, inhabited or otherwise occupied the Missisquoi homeland; the Missisquoi had exclusive control and dominion over the area. T I at 124, T IV at 30-31, D at 124-126 and C III at 53.

9. Other evidence, some of which is explored in more detail below, bolsters the archeological record. Place names have a Missisquoi source. The river that flows through the region is the Missisquoi. It flows into the Missisquoi Bay. "Missisquoi" is derived from the Western Abenaki "Mazipkoikis", meaning "place where there is flint." Oral traditions, stories carefully handed down

from generation to generation, place Missisquoi origins in northwestern Vermont. When given an opportunity the Missisquoi have consistently insisted upon their continued presence essentially forever. T I at 149.

10. In nonliterate societies oral traditions allow exploration of all levels of society. Written histories tend to focus merely on the concerns of the literate upper levels. Experience with oral histories demonstrates that they are just as reliable as written histories. T I at 127 and 130. Accuracy of reporting can be maintained over extraordinary periods of time. T I at 128.

11. The Western Abenaki, including the Missisquoi, have a very definite, carefully maintained, carefully transmitted oral tradition, which is a useful source of information concerning the location of their ancestral homelands. D at 47-49.

12. By way of example, the Western Abenaki set their stories of creation and transformation in the Champlain Valley of Northwestern Vermont. In the creation and shaping of the earth the last element completed was Lake Champlain. Odziozo, the principal transformer, turned himself into stone so that he could watch for all eternity his finest creation, Lake Champlain. T I at 150 and D at 61.

13. These traditional stories of the early beginnings imply a long standing presence of Western Abenaki culture in northwestern Vermont. T I at 152.

14. In 1609 Samuel Champlain, when exploring the lake named after him, became aware of the presence of

the Missisquoi, people residing in northwestern Vermont, whose ancestors had lived in that part of what is now known as the United States and whose tribe or community recognized them as Indians. T I at 148.

15. In 1615 French missionaries observed established Missisquoi settlements, including a village on the lower falls of the Missisquoi River, a group in St. Albans and a separate group on the Lamoille River. T I at 149 and T III at 112.

16. From the time of Champlain's explorations to the formal transfer of power to the British after the French defeat in the French and Indian wars (1609-1763) despite French presence and influence the Missisquoi remained in place as a distinct native American community. C III at 58.

17. Because the French depended upon the native Americans as allies their policy was to pursue and maintain harmonious relations with them. C III at 56.

18. In 1635 Western Abenakis first appeared in history as a "distinct ethnic group," making contact with Europeans at Penacook or Concord, New Hampshire and Northfield, Massachusetts. D at 44.

19. The first specific historical references to Abenakis as a "distinct ethnic group" located on the eastern shore of Lake Champlain were made in 1680. D at 44.

20. Among the exhibits are a series of maps which demonstrate, in part, a continued Missisquoi presence on the eastern shore of Lake Champlain. The Court accepts these and the others mentioned from time to time below

as legitimate and relevant. Among these are Defendants' Exhibīt C, a map published in 1694. This map is the first printed view of the Lake Champlain watershed with many of the same place names we have today, e.g. Missisquoi (the village), Winooski and Otter Creek. T III at 179.

21. In 1723 written reference to Missisquoi as a geographical location appears because of the attacks of Grey Lock, a Missisquoi war leader, who directed his efforts for the most part against the frontiers of Massachusetts. D at 45, 59, and 110; C III at 65.

22. Grey Lock's belligerence during the period 1700-1740 established Missisquoi in the minds of the English as a bastion of Abenaki resistance and brought the pace of British settlement to a screeching halt. C III at 66-67, T III at 189-190.

23. In 1730 a plague hit the Missisquoi area, which the inhabitants temporarily abandoned in favor of Odanak, Quebec. They returned by 1732. D at 139.

24. In the short period that followed quite a few Western Abenaki came from Odanak and settled in Missisquoi, which was a substantial village in 1738. D at 140.

25. During the 1730's-1740's the Missisquoi were coming to Fort Frederick, a French mission base across the lake in New York, to visit, be baptized or engage in other religious activity. Their names show up on the fort's baptismal records. C I at 53-54.

26. Defendants' Exhibit G is a map of New England and New France, published in 1749, showing Mississiasi (Missisquoi) at Missisquoi Bay.

27. In 1759 with the French and Indian war raging around it the Missisquoi community remained intact. T III at 213.

28. Defendants' Exhibit L, an English military map, shows the location of the Missisquoi village in 1762. T III at 226.

29. In 1765 a Canadian merchant, James Robertson, negotiated a ninety-one year lease of land with the heads of nineteen Missisquoi families. The property was located on the lower Missisquoi River and encompassed most of what we now know as the village of Swanton and all the remaining land down to the mouth of the Missisoquoi River. T III at 221 and D at 138.

30. The alleged fishing violations of thirty-one of the defendants occurred within the boundaries of the lease. T III at 221.

31. Missisquoi culture did not countenance individual ownership of real property; the Missisquoi held their homeland collectively. As a result, the heads of family bands, which could comprise as much as fifty individuals each, signed on behalf of their bands. T III at 220, C III at 87 and 89-90.

32. The lease by being a lease and not a sale, theoretically guaranteeing a reversion, demonstrates an effort by the Missisquoi to grapple with European settlement in a way that ensures long term sovereignty over the entire area. T III at 217.

33. Some of the Missisquoi who signed the lease used French baptismal names. When dealing with Europeans this practice was very common simply because it was easier. D at 172.

34. By it terms the lease demonstrates that the Missisquoi were planting and harvesting crops during the 1760's.

35. Grand Avenue and South River Streets, where some of the crimes alleged in the informations underlying the pending motions to dismiss allegedly occurred, are in the village of Swanton within the land encompassed by Robertson's lease. T IV at 153.

36. When the Treaty of Paris in 1763 ended the French and Indian war the Missisquoi suddenly found that they were included under the authority of the governor of New York, rather than of Canada, with whom they had been allied and upon whom they depended for trade and supplies. D at 92-93.

37. In 1766, at Isle La Motte, one of the Lake Champlain Islands that is a part of present day Grand Isle County, the governor of Quebec, Governor Murray, and the governor of New York, Governor Moore, met primarily to establish the forty-fifth parallel as the boundary between the two English territories. C II at 37, C III at 95, D at 92-93. Also present at the meeting was Daniel Claus, a deputy of the English Indian Affairs Office. C II at 37. The Missisquoi and the Caughnawaugas, a Catholic Mohawk tribe that was part of the Iroquois nation, sent representatives to the Isle La Motte meeting. C III at 97-98.

38. At the meeting, the Missisquoi complained of settlers on their land. C II at 56. The Caughnawauga claimed the Missisquoi territory on the basis that they were the descendants of ancient Mohawks who frequented the area. C I, Ex. F, XII *Papers of Sir William Johnson* 172 (M. Hamilton ed. 1957) "An Indian Conference"; C III at 95-96. Apparently in protest to the Caughnawaugas' claims to the territory, the Missisquoi claimed that they had controlled the Missisquoi territory "for time unknown to anyone here present" and no one else had laid claim to it with the exception of the French who requested to erect a sawmill. Hamilton, *supra;* C III at 100. The Caughnawaugas' then released their unsubstantiated claim to the territory, retaining only hunting and fishing rights. C II at 37-38, C II at 95-6 [sic], T III at 77 at D at 96. There is some evidence that Daniel Clause considered the Caughnawaugas' cession to operate as a cession of Native American possessory rights in the Missisquoi territory. C II at 38, 111; C IV at 184.

39. The British did not have the overwhelming archaeological evidence available to us today to know that the Caughnawauga claim was unsupportable. There is no reason to believe they had any evidence to support the Caughnawauga position, either. In any case, the British took a most convenient position, that the Caughnawauga concession was something in their power to make. C II at 37-38, C II at 96.

40. Defendant's Exhibit M consists of two maps published in 1776, each noting the position of the Missisquoi village. T III at 228.

41. In the period 1775-1785 the Missisquoi lost control of choice farmland along the Missisquoi River as English and Dutch settlers moved in. D. at 87.

42. A letter from Clement Gosselin to Ira Allen substantiates the presence of Missisquoi in the Missisquoi homeland in 1786. They were claiming land and threatening to use force against the settlers. C II at 101-102.

43. In 1783 the Missisquoi engaged in a traditional non-confrontational response; they went "underground." More specifically their response to the influx of Europeans was withdrawal from central areas into other areas in the Missisquoi homeland, where they would be out of sight. There is no evidence that they ever abandoned their homeland, though some did move to Odanak. When underground they never had total invisibility. C I at 77, D at 140 and 186 and C I at 78.

44. These withdrawals were generally designed for various reasons of safety, including, e.g., protection against plague outbreaks, the Revolutionary War and threats from Iroquois and Algonquin tribes. T I at 181-182, C at 78 and D at 174.

45. Following the Revolutionary War the majority of the Missisquoi stayed in the homeland.

46. After being dispossessed of lands the Missisquoi repeatedly asserted their claims to the land. D at 91.

47. British maps, oral traditions and public records confirm the continued existence of the Missisquoi community in the 1790's, though the tribe lost possession of some lands it formerly held. C III at 139-140, C I at 80.

48. In 1790 the Dutch settlers were getting along pretty well with the Missisquoi. Face to face confrontations with yankees over their presence and control of land are of record. C I at 75-76.

49. Defendant's Exhibit N is a map published in 1791, showing an Indian "castle." This term is misleading. It means a village, perhaps one where there was a palisaded area to which the inhabitants could withdraw in case of attack. T III at 234-235, C III at 134-135, C IV at 43.

50. This village is also noted on the maps as Grey Lock's castle. Construction of whatever palisaded structure that may have existed occurred late in the seventeenth century, C IV at 43, T III at 30.

51. Although they remained united, by 1791 the Missisquoi were dispossessed of the choicest part of their homelands and were in several neighborhoods around "a particular though ill-defined territory." D at 89-90, T I 203-204.

52. Defendant's Exhibit N is a map published in 1794, which continues to show the Missisquoi in place. T III at 236-238.

53. Defendant's Exhibit P is a map which shows the Missisquoi village still intact. That situation came to a final halt in 1798. From then on the Missisquoi no longer occupied their main village. T IV at 25, 33.

54. At the dawn of the nineteenth century the slow process of converting the Missisquoi into a group of family bands was complete, but the "ethnocentric historical juggernaut" that pressed for a conclusion that the

Missisquoi had abandoned their homeland was fueled by fantasy C II at 189, T III at 149.

55. We know now that Western Abenaki presence in Vermont was significant at the time of European contact, that it remained significant, and that even though there is migration, movement and upheaval in their homeland there is a continuing and persistent Missisquoi presence to time present. C III at 38, T I at 156-157, T III at 203, and D at 129.

56. The Missisquoi never voluntarily abandoned any portion of their homeland. T IV at 32.

B. Fishing: Basic Native American subsistence

57. The Missisquoi homeland since time immemorial has been an "extremely good place to live." The main village was "one of the richest natural sites in the northeast." "That's why [the Mssisquoi] were there." T I at 163, D at 56.

58. The area is rich in natural resources, including animals, plants, birds and aquatic life. It lies on a natural north/south highway, the Hudson/Champlain/Richilieu waterway connecting to the Great Lakes through the St. Lawrence River. T I at 163.

59. The bony remains of fish are found at Missisquoi archeological digs going back seven thousand years; the Missisquoi have been fishing "forever." T I at 168.

60. Fishing and hunting formed the base of the Western Abenaki food supply. Those were supplemented by gathered plant foods in a minor way. Later, cultivated corn entered the diet. D at 68 and 114.

61. Fishing and hunting were almost the center of Western Abenaki culture. D at 114.

62. Today, fishing is still a great community preoccupation among the Missisquoi, one that has continued since it first began. T I at 37 and 168, T IV at 44, D at 119.

63. No other native American tribes ever fished in the Missisquoi homeland. T I at 168.

C. Missisquoi Abenaki culture

64. The Missisquoi are a body of Indians of the same or similar race united in a community under one leadership or government, inhabiting a particular though sometimes ill-defined territory and have been from time immemorial through the formation of the United States up to the present. T I at 185, T II at 9, T IV at 53, C III at 144, D at 80.

65. At the time of first European contact in 1609 the Missisquoi community subsisted on hunting, fishing and gathering, supplemented by horticulture. Community organization fluctuated to accommodate subsistence requirements, i.e. the people came together for planting, harvesting and fishing during spawning and dispersed for hunting into family bands. In short, the community was fluid and flexible accommodating movement, periodic dispersals and regroupings. C III at 5.

66. As of 1750 the Missisquoi community continued to be characterized by a subsistence economy, organized and acting in an independent way. T I at 185.

67. This community was a non-hierarchical society marked by sexual equality. There was a feeling of belonging to a particular territory. The political organization

was based on persuasion and consensus. They raised their children in a nonauthoritarian way. Religious beliefs were animistic. The core community values were cooperation, sharing, humility, a sense of personal privacy and a sense of oneness with the natural world. T I at 189.

68. Western Abenakis, a people that now or at one time inhabited areas in Canada and Vermont, were essentially one people at one time D at 37.

69. The Western Abenaki, including the Missisquoi, are a distinct ethnic group, one that is characterized by presumed common descent, common language, a feeling of shared identity, common customs and a common world view. D at 21, 43-44.

70. The Missisquoi have maintained their distinct ethnicity throughout the course of their history. They are a distinct Native American group as of today and and [sic] view themselves a [sic] distinct from the rest of Vermont. T I at 205, T IV at 54, 64, D at 43-44 and 75.

71. The Western Abenaki share a common value and belief system exemplified by a sacred and extremely strong attachment to the homeland, which has no counterpart in contemporary American culture. T I at 179-180, D at 69.

72. The fact that the Western Abenaki have stuck it out over the last two hundred years in their old homeland in the face of really great pressures evidences their deep sense of attachment to the land. T I at 237.

73. The Missisquoi mythology includes a supreme being, a semi-human super shaman and a host of lesser creatures, including a "trickster." D at 71.

74. They continue the use of sweat lodge, which functions as it sounds as a means of spiritual purification. T II at 5.

75. The Missisquoi continue to have various ceremonies, but the numbers are reduced. D at 77.

76. The Missisquoi have an ethic of not wasting. They believe, for example, that you must respect animals and not waste their bounty on pain of their withdrawing their willingness to allow themselves to fulfill human needs. T I at 167.

77. The eighteenth century saw the Missisquoi become increasingly dependent upon Europeans for such things as woven cloth. They adopted some things they wanted or found useful, but didn't discard all their old skills and techniques. C IV at 76.

78. The Missisquoi have not abandoned their identity, but some items of their culture have disappeared. D at 106.

79. "Abenaki" is basically a linguistic term. At its limits it includes Western Abenaki, Eastern Abenaki and Passamaquoddy Maliseets. D at 22.

80. Under white pressure the Western Abenaki have narrowed to two groups, one at Missisquoi and one at St. Francis (Odanak). D at 79.

81. The Missisquoi community no longer speaks Western Abenaki, as the Irish no longer speak Gaelic. T I at 213, T II at 101.

82. An extended family structure comprised of family bands exists now as it has since time immemorial.

Each band is a component of the tribe as a whole, each linked by kinship, economics, leadership and a world view, which historically saw them thinking of themselves as being at the center of the universe. T I at 225, C III at 52.

83. There is an extraordinary amount of community interaction within and among the Missisquoi families. T BV at 69.

84. Traditional Missisquoi governance is by the great man. In essence the community waits for someone with sufficient prestige to rule by consensus. Though there is always some break in leadership with the death of a chief, the Missisquoi have been able to maintain a sequence of leaders and a feeling of group identity. The historical record shows that in 1760, for example, Louis Attolomaguin was looked upon as a leader. D at 84, 107, 111, 112.

85. Missisquoi cultural tradition has been to have representatives conduct relations with other peoples. T I at 235, D at 107.

86. Since 1972 the leadership has been somewhat formalized by an elected chief and tribal council, but there continues to remain intact an extensive network of heads of families and community leaders that surround and contain the formal leadership. T IV at 75-76.

87. Because of their continued feeling for an ethnic identity the Missisquoi largely marry now, as they did into the distant past, within their community. The endogamy (community intermarriage) figure is 60% or better. T I at 230, T IV at 57, D at 69.

88. This community intermarriage supports our conclusion that the Missisquoi are a body of Indians (as the precedential cases call them) of the same or similar race. T I at 86.

89. The simple fact that the Missisquoi are referred to in the record as Missisquoi indicates that throughout recorded history, to one degree or the other, they were regarded as a distinct community. C III at 50.

90. In dealing with Europeans the Missisquoi have tried to remain as inconspicuous as possible, dealing through a few front families. T I at 106.

91. The Missisquoi community has been characterized, as well, by cooperative use and sharing of subsistence ground and other refuges and by sacred burial grounds. T IV at 58-59.

92. A workable definition of assimilation: When a people completely lose their identify [sic] and identify with the culture and society into which they have been assimilated. The Missisquoi have not become assimilated. T I at 211-212.

93. To be a member of the Missisquoi tribe one must share a common set of values with its members; one must be "culturally Missisquoi." T III at 106.

D. Missisquoi geography

94. Archaeologists establish the eastern boundary of the Iroquois near the western boundary of the Missisquoi; they are separated by Lake Champlain. The [sic] derive these conclusions from finding, for example, distinctly different pottery remains on opposing shores of the lake. T I at 173.

95. The Champlain Islands, including North Hero, South Hero and Isle La Motte are in Missisquoi territory. T I at 171.

96. The Missisquoi, without a break, have occupied the following territory since 9300 B.C.: The Missisquoi River watershed into Quebec and over to Lake Memphramagog, down into Missisquoi Bay, Alburg, the Champlain Islands, St. Albans, Swanton, Highgate, Fairfield, Fairfax, Georgia, Sheldon, Fletcher and Northern Milton. T I at 153-154, T II at 230, T III at 63, 153-154.

97. The Missisquoi village existed for thousands of years in an area that incorporates Swanton and Highgate. Its core was on the lower Missisquoi River. T I at 161, T III at 206.

98. The 45th parallel, which divides Vermont from Quebec province, runs pretty much through Missisquoi Bay. As a result, some of the Missisquoi homeland is now in Canada. C II at 39.

99. The various crimes with which the defendants stand charged happened on the following dates in the following places, all of which are in the traditional Missisquoi homeland:

a. August 23, 1986, Harold St. Francis, motor vehicle offense at Lake and Federal Streets, St. Albans, near Route 7.

b. October 27, 1986, Harold St. Francis, motor vehicle offense on Grand Avenue, Swanton.

c. December, 1986, Harold St. Francis, motor vehicle offense, South River Street, Swanton.

d. February 26, 1987, Harold St. Francis, motor vehicle offense, County Road, Swanton.

e. May 21, 1987, John Churchill, misdemeanor and motor vehicle offense, 40 Pine Street, Swanton.

f. July 11, 1987, John Churchill, misdemeanor, Carte Hill Road, Highgate.

g. July 11, 1987, John Churchill, motor vehicle offense, Route 78, Highgate.

h. October 18, 1987, thirty-one defendants fishing without a license or failure to display license, west side of Missisquoi River, Swanton.

i. January 6, 1988, Homer St. Francis, motor vehicle offense, Missisquoi Game Reserve access, Swanton.

j. April 23, 1988, John Churchill, felony, Hotel Riviera, Swanton.

100. In 1777, one could float a birch bark canoe in the area of the fish-in. The river was no more navigable than this. T IV at 250.

E. The Coming of the Europeans

101. Ironically, it was the Fourth of July, 1609 when Samuel Champlain became the first European to venture into Missisquoi country, though he had no direct contact with the natives. D at 86.

102. Up until 1760 European settlement in Missisquoi was almost non-existent. T III at 201.

103. French records reveal a missionary and military presence after 1723, followed by a missionary settlement in 1744. In 1748-1749, the French established a sawmill on the lower falls of the Missisquoi homeland, establishing a community consisting of no more than 50 Europeans. T I at 158, D at 60.

104. Even in 1783, following the American Revolution, only a handful of Europeans were settled in Missisquoi. Those numbers continued to grow until today when thousands of non-native Americans reside in the area, the Missisquoi Abenakis comprise a decided minority with their numbers not exceeding 2600. C I at 74, T IV at 47.

105. There has never been a cession, treaty, or action by the United State government the purpose of which was to deprive of or extinguish Western Abenaki or Missisquoi rights to their ancestral homeland. D at 130, C III at 141.

106. The French made land grants prior to being ousted by the Englsih [sic] after a losing effort in the French and Indian War. The LaVasseur grant, which required the grantee to begin development within five years, included Swanton. Others included Highgate and St. Albans. Most of the French grants were not developed. C II at 52-53.

107. The Missisquoi fought for the French during the French & Indian War. The French defeat was certain by 1760. The Articles of Capitulation signified the end of hostilities. Article XL of that document makes provision for the honorable, good and fair treatment of the French native American allies by the English. Because the Missisquoi were allies of the French King they were protected

under the Articles of Capitulation. C I, Ex. C, The Articles of Capitulation, 1760, England-France, Article XL. C II at 62, 144 and C III at 59, 65.

108. The Treaty of Paris in 1763 formalized the French defeat and made the English successors to the French interests in Vermont. The Treaty of Paris essentially had the same purposes as the Articles of Capitulation and deal with the effected Native Americans and their homelands in a similar manner. C III at 59, 67-8.

109. For fourteen years (1763-1777) the English controlled what we now know as Vermont. From 1777 to 1791, when Vermont entered the Union as the fourteenth state, Vermont was an area in dispute among several governments; New York, the so called Republic of Vermont and, until 1783, the English as well. C I at 87.

110. It was not altruism that spurred protections of native American interests. The Crown did not want any more Indian wars, and they recognized the value of amicable relations with the Native Americans. C III at 76. Accordingly, the English formulated a general Native American policy that is expressed in a royal proclamation, royal instructions and directions. C III at 61, 70, 71, 75. Because the purpose of the policy was to maintain peace on the frontiers, any purchases of Native American land would necessarily have to be made from the Native Americans with true occupancy claims. C IV at 187-88.

111. The 1755 Royal Instruction 671 recognized the danger posed to the security of the colonies by the unauthorized purchase of the Native Americans' land. Royal Instruction 671 reads in pertinent part:

> And whereas private persons in several of our colonies in America have frequently purchased lands from the indians without any license from us or from any person acting under our authority which PRACTICE is inconsistent with our rights and may endanger the peace and security of our said colonies . . . . "671. Purchase of Lands From Indians" II *Royal Instructions to British Colonial Governors 1670-177* 467 (L. Labaree ed. 1935), C I, Ex. B.

112. In its Royal Instruction of 1761 the Crown condemned the unauthorized appropriation of Native American land by both private persons and royal governors. Recognizing the danger to the colonies of this practice, the Crown prohibited the governors form passing any grants to land reserved to or claimed by the Native Americans and required that those who had settled on said lands remove themselves immediately. The Crown also prescribed the proper procedures for any future grants.

The Royal Instruction of 1761 reads in pertinent part:

> Whereas the peace and security of our colonies and plantations upon the continent of North America does greatly depend upon the amity and alliance of the several nations or tribes of Indians bordering upon the said colonies and upon a just and faithful observance of those treaties and compacts which have been heretofore solemnly entered into with the said Indians by our royal predecessors, kings and queens of this realm; and whereas notwithstanding the repeated instructions which have from time to time given by our late royal grandfather to the governors of our several colonies upon

this head, the said Indians have made and do still continue to make great complaints that settlements have been made and possession taken of land the property of which they have by treaties reserved to themselves by persons claiming the said lands under pretense of deeds of sale and conveyance, illegally, fraudulently, and sureptitiously [sic] obtained of said Indians; and whereas it has likewise been represented unto us that some of our governors or other chief officers of our said colonies, have countenanced said unjust claims and pretensions by passing grants of the lands so pretended to have been purchase of the Indians; we therefore, taking this matter into our royal consideration, as also the fatal effects which would attend a discontent amongst the Indians in the present situation of affairs, and being determined upon all occasions to support and protect the said Indians in their just rights and possessions and to keep inviolable the treaties and compacts which have been entered into with them, do hereby strictly enjoin and command that neither yourself nor any lieutenant governor, president of the council, or commander in chief or our said province of – do upon any pretense whatsoever upon pain of our highest displeasure and of being forthwith removed from your or his office, pass any grant or grants to any persons whatever, of any land within or adjacent to the territories possessed or occupied by the said Indians or the property or possession of which has at any time been reserved to or claimed by them; and it is our further will that and pleasure that you do publish a proclamation in our name strictly enjoining and requiring all persons

whatever who may either willfully or inadvertently have seated themselves upon any lands so reserved to or claimed by the said Indians without any lawful authority for so doing, forthwith to remove therefrom. And in case you shall find upon strict inquiry to be made for that purpose that any person or persons do claim to hold or possess any lands within our said province upon pretense of purchases made of said Indians without a proper license first had and obtained either from us or any or our royal predecessors or any persons acting under our authority, you are forthwith to cause a prosecution . . . . And where as the wholesome laws which have at different times been passed in several of our said colonies and the instructions which have been given by our royal predecessors for restraining persons from purchasing land of the Indians without a license for that purpose and for regulating the proceedings upon such purchases have not been duly observed; it is therefore our express will and pleasure that when any application shall be made to you for license to purchase land of the Indians, you do forebear to grant such license until you shall have first transmitted to us by our Commissioners for Trade and Planning the particulars of such applications as well in respect to the situation as the extent of the lands so proposed to be purchased and shall have received our further directions therein. . . . .

Circular: . . . New Hampshire, New York . . . Dec. 12, 1761. "687. Settlements Interfering with Frontier Indians Forbidden". II *Royal Instructions to British Colonial Governors 1670-1776* 476, (L. Labaree ed. (1935), C I, Ex. D.

113. On October 7, 1763, the Crown issued a Royal Proclamation, which established a boundary line that ran up the Green Mountains, (the Proclamation Line) and laid down certain procedures for acquiring Native American lands east of the range and reserving the lands west of the range to the Native Americans. C I at 101, 103; C III at 72-74. Because the Green Mountains were the boundary, and land west of the boundary was reserved to the Native Americans, the Missisquoi territory is located within the lands reserved to Native Americans. C III at 74, C IV at 122, 138-39 . The Crown could extinguish aboriginal title in areas it thought proper for settlement with the agreement of the Native Americans by purchase of the Native Americans' land in formal, open meetings held for that purpose by the Governor or Commander in Chief of area where the Native Americans's land was located. C IV at 126-30. Additionally, any one who had settled on Native Americans' land, whether lawfully or not, was required to leave that land.

The Royal Proclamation of 1763 states in pertinent part:

> And whereas it is just and reasonable, and essential to our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their hunting Grounds. -We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure . . . . that no governor or Commander

in Chief in any of our other Colonies or Plantations in America (other that Quebec, East or West Florida) do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And, We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of said Indians, all the Lands and Territories not included within the Limits or Our said Three new Governments, or within the limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either willfully or inadvertently seated themselves upon nay [sic] Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as

aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great prejudice of our interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities in the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the advice of our Privy Council strictly enjoin and require, that no private person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement; but that if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in our Name, at some Public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of (unreadable) Proprietaries . . . "By the King. A Proclamation. October 7, 1763", II *Constitutional History of Canada 1759-1791* 163, 166-67 (A. Short ed. 1918). C I, Ex. E. Hereinafter referred to as the "Royal Proclamation of 1763".

114. Royal governors administered crown authority in the New World. C I at 93. That authority, however, was restricted by the Royal Instruction of 1761 and the Royal Procalamtion [sic] of 1763. C I at 93 C III at 80-82. Benning

Wentworth, after whom Bennington, Vermont was named, was governor of the area known as New Hampshire between 1741 and 1766. C I at 93. After the the [sic] Royal Proclamation of 1763, the exercise of crown policy toward Native Americans living west of the Proclamation line was in the hands of appointed Indian agents, not royal governors. C I at 123, C II at 43. One of the [sic] these agents was Sir William Johnson. C I at 108. Irregardless of whether land was east or west of the Proclamation Line, any English acquirement of Native American lands required their agreement and an open meeting of the Native Americans and either the governor or indian, whichever was appropriate. C IV at 121-22, 126-27.

115. Prior to the Royal Proclamation of 1763, on August 17, 1763, Wentworth made the St. Albans, Highgate, and Swanton grants, even though no native Americans were consulted or dealt with in any formal way. C I, Ex. 2, St. Albans Grant; Ex. 3, Highgate Grant and Ex.4, Swanton Grant. None of the grants state that the land was unoccupied by Native Americans. It was was [sic] first in 1783 that Europeans settled the granted areas, which today have the same borders as found in the original grants. D at 132.

116. In 1764, with the advice of the Privy Council, the King issued an order, which scholars interpret as overturning, without mentioning them by name, the St. Albans, Highgate, and Swanton grants, because it established the Connecticut River as the boundary between New Hampshire and New York. C I at 93, 95, C II at 27.

117. In 1765 Moses Haven, a British soldier, petitioned the royal governor of Lower Canada for a land

grant in the Missisquoi region. The governor sent surveyors to establish *inter alia* whether there were inhabitants. The governor turned down the petition on the basis that the area was Indian land. C III at 93-94.

118. Sir William Johnson, consistent with the negotiation requirements of the Royal Proclamation, negotiated the Treaty of Fort Stanwix with the Iroquois in 1768. The apparently ultra vires treaty attempted to move the line of permitted settlement westward, west the of [sic] Missisquoi homeland. C I at 114-115, 117, 121; C IV 96-97.

119. The Treaty of Fort Stanwix is controversial. It is apparent that Sir William Johnson exceeded his authority. Consistent with findings above, we find that the Iroquois sold out lands to which they had no legitimate claim, namely the Missisquoi homeland. C I at 114-20; C IV at 96-97, *infra*, finding # 94 at 18-19.

120. Even though Sir Johnson negotiated the movement of the Proclamation line Westward in 1768, the original Proclamation Line was not fully negated until the Quebec Act of 1774. C I at 117, 128. The 1763 Proclamation line was still in effect in 1771. C II at 60.

121. In 1768, the royal governor of New York, Henry Moore, made the Metcalfe grant. C I, Ex. 25, 16 *New York Land Patents* 38, Simon Metcalfe's Tract. Three years later in 1771, a subsequent royal governor of New York, John Earl of Dunmore, made the Prattsburgh grant adjacent to the Metcalfe grant. C I, Ex. 11, 16 *New York Land Patents* 66, Prattsburgh Grants; C II at 57-60. These two grants roughly encompass the same area as the Wentworth grants. C I, Ex. 10, J. Graffagnin *The Shaping of Vermont*, Map, (1983). There was no evidence that the

land granted by these two grants was obtained from the Native Americans in an open meeting with their consent as required by English policy at that time. C IV at 121-22, 126-27.

122. The Continental Congress resolved late in 1775 that the St. Francis or the St. John Missisquoi could "be called upon in a case of real necessity . . . ". C I, Ex. K, III *Journals of Congress 1774-1789* 400 (W. Chief ed. 1905). There is some confusion as to the nomenclature used to describe the Missisquoi in that period of time as they were sometimes referred to as St. Francis Indians and other times St. Johns Indians. C III at 166-68. During the American Revolution, American generals Washington and Schuyler were concerned that the Missisquoi were hostile and might attack. Ira Allen, as as [sic] well, regarded them hostile. C II at 86.

123. The outbreak of the American Revolution found many Native American tribes divided over which side, if either, to support. The Missisquoi were no exception. Though most stayed out of it, some sided with the British and some with the Americans, apparently more with the Americans. C II at 155, 162, C III at t 111. In 1786, Major Clement Gosselin stated in a letter written to Ira Allen that a number of Missisquoi served the United States. C I, Ex. 27, 1786 Letter from Major Clement Gosselin to Ira Allen.

124. The so-called Republic of Vermont declared its conditional independence in 1777. In order not to offend the Union, which it was looking to join, it declared itself free and independent, but not in a way inconsistent or

repugnant to any resolve of the Continental Congress. C III at 117.

125. The Vermont Declaration of Independence reaffirmed the Wentworth grants, saying in effect that the 1764 Privy Council order should not apply. C I, Ex. 28 The Declaration of Independence paras. 2 and 3 (Vt. 1777); C I at 95, C II at 140.

126. The alleged Republic's legislature enacted several statutes including the following:

a. An Act for Appointing County Surveyors in the Counties; and Directing them and Regulating them in the Execution of their Office, 17 February 1779, 1779 Vt. Laws at 80; C I, Ex. 12. This Act addresses the appointment of appropriately skilled surveyors as county surveyors for the purpose of performing surveys and other services, the appointment of surveyor's assistants and penalties for interfering with surveyors.

b. An Act for Enabling Communities to Maintain, Recover and Defend their Common Rights, Estates and Interests, 19 Feb 1779, 1779 Vt. Laws at 42; C I, Ex. 13. By this Act, several entities including grant holders and proprietors of undivided land were entitled to bring suit in the proper court to maintain, defend or recover their grants, interests or estates. The Act also entitled them to appear to defend suits against them and provided proper notice procedures.

c. An Act Regulating Proprietor's Meetings, 23 February 1779, 1779 Vt. Laws at 122; C I, Ex. 14. This Act laid out the procedures by which Proprietor's meetings could be called and conducted, including the election of officers,

recording of minutes, town business and voting thereon, the approval and recording of survey bills, and taxation procedures.

d. An Act to Prevent Unlawful Settlement on Unappropriated Lands, 16th March 1780, 1780 Vt. Laws at 190; C I, Ex. 17. Under this Act, anyone who wished to settle or improve unappropriated lands after March 16, 1780 was required to obtain legal title to the land first or they would have to give up possession and pay any damages. If it could be demonstrated that the settlement or improvements were made due to mistake or a supposedly legal title, payment could be recovered for settlement labor. A warning was also issued against fraudulent claims. At no time does the Act mention Native Americans or aboriginal title.

e. An Act Directing Proceedings Against Forcible Entry and Detainer October 22d 1782, 1782 Vt. Laws at 140; C I, Ex. 15. This Act authorizes the Justice of the county to investigate any complaints made of forcible entry into or wrongful detainer of houses, land or tenements located in the county and enlists the aid of the sheriff to arrest the offender. It also provided procedures for an inquiry into the incident, a seizure of the property and penalization of the offender if appropriate. Procedures were also stated for incidents where a lessee allegedly held over property let to him.

f. An Act in Addition to an Act Regulating Proprietor's Meetings, October 23, 1783, 1783 Vt. Laws at 223, C I, Ex. 24. This Act grants town proprietors the power to permit one of the proprietors to use undivided lands to build mills which would encourage settlement.

g. An Act Declaring Time When to Begin the Settlement of New Lands, that has been prevented by the late War Between Great Britain and America, October 23, 1783, 1783 Vt. Laws at 219; C I, Ex. 21. Recognizing that many grants were conditioned on settlement within a certain period and that the Revolutionary War disrupted settlement, the Legislature set an official date beginning the settlement period.

h. An Act Directing, Proceedings Against Forcible Entry and Detainer February 20th, 1787, 1787 Vt. Laws at 141; C I, Ex. 19. This Act is nearly identical in content to the preceding act of the same name enacted October 22, 1782. *See* finding 126(e).

i. An Act for Punishing of Trespasses in Divers Cases and Directing Proceedings Therein. March 8th 1787, 1787 Vt. Laws at 264; C I, Ex. 18. This Act provides for the punishment of any person who trespasses on another's lands and takes or destroys, timber, crops or fruit or sets fires. Punishment is also provided for one who disguises himself and commits any of the above trespasses, abuses any person or leaves open any gate or fence to an enclosed area.

j. An Act Regulating Fisheries, March 8th 1787, 1787 Vt. Laws at 253; C I, Ex. 22. This Act prohibits the erection of any structure across any river in the State which obstructs the natural passage of fish, except dams necessary for mills. One who does erect such a structure is guilty of nuisance and subject to a fine.

127. In 1791, the Republic of Vermont settled New York's claims to its lands with a $30,000.00 payment, clearing the way to entry into the Union. C I at 88.

128. The Missisquoi survived as a native American community in their traditional homeland throughout the existence of the Republic of Vermont, living openly and unmolested. C III at 111-112, 146.

129. No explicit acts or expressions of intention to extinguish Missisquoi aboriginal rights by any Vermont, New York, New Hampshire, Quebec, Continental Congress body or the United States federal government exist.

130. It was alien to the Missisquoi culture to go to colonial courts to maintain or vindicate property rights, and, therefore, it was not a viable option. C III at 158.

F. Missisquoi population figures

131. Using varying indirect methods of estimation, e.g. numbers of houses times estimated number of people per house, the experts show a Missisquoi native American population in the seventeenth and eighteenth century ranging from 200 to 2000 souls, with 750 being a fair estimate. In 1900 it had grown to 1500. As suggested above, the population in the homeland has now grown to as much as 2600. T I at 161, T II at 222, 228, T III at 110, 202, T IV at 46-47, C at 72.

132. The Court takes judicial notice of the following census figures derived from the 1988 *Vermont Yearbook*. These figures are the latest available, based upon the 1980 census.

Place	Population
Vermont	511,456
Franklin County	34,788
Grand Isle County	4,613
Alburg	496
Fairfax	1,805
Georgia	2,818
Grand Isle	1,238
Highgate	2,493
Isle La Motte	393
Milton	6,829
North Hero	442
St. Albans	7,308
Sheldon	1,618
South Hero	1,188
Swanton	5,141

133. Eighty to ninety percent of tribal members still live in the Missisquoi homeland, while others return regularly. T IV at 73-74.

134. A small neighborhood in Swanton, consisting of several streets and known as Back Bay, has a forty to sixty percent Missisquoi population. T II at 171-172.

135. For a variety of reasons attributable to both the Native Americans and the census process, the Native American census count is not valid from 1790 forward. Moody T III at 154.

136. Though the details are not clear from the evidence, tribal membership is a function of birth and a formal process of induction. T IV at 72.

G. Education, formal governance, employment and related issues.

137. The Missisquoi governing body is a tribal council, with members elected by the tribe. T III at 45.

138. Needing a non-profit corporation and finding it inconsistent with tribal sovereignty to incorporate, the Missisquoi formed the Abenaki Self-Help Association, Inc. (ASHAI) in the early 1970's to act as a conduit for federal and other funds. T V at 188, 197.

139. Membership of ASHAI is one hundred percent Missisquoi Abenaki. T III at 45.

140. In order to receive federal funds through the Administration of Native Americans (ANA) an organization must be Native American to the satisfaction of the federal authorities. In 1982 ANA designated ASHAI as one of only ten nationwide grantees. T V at 163, 174.

141. In certain years, ASHAI funneled well in excess of $100,000 into the Missisquoi region, though not all of it was earmarked for Native Americans. The Vermont Housing Finance Agency's neighborhood Self-Help Development Program funds were not Native American specific. T V at 166, 171.

142. Abenaki Acres, a low income housing program was a cooperative effort between the Missisquoi and ASHAI. T V at 124.

143. Other federal program grants which ASHAI has served over the years include

a. ANA economic development grant for the codification of tribal laws and leadership training, which was "almost a formula distribution among Indian people in New England." T V at 161.

b. Community Service Administration grant.

c. Community Food Program grant received because Missisquoi accepted as an Indian tribe and organization by the Indian Task Force of the federal regional council in Boston, Massachusetts. T V at 155.

d. Indian Manpower Program. ASHAI was the primary sponsor for Vermont and New Hampshire.

e. Department of Labor JTPA grant, designed for Native Americans and provides employment and training services to the Native American communities in Vermont and New Hampshire. T V at 203.

f. Title IV PART B grant for pre-school/kindergarten through office of Indian Education for Native American children. T V at 170, VI at 35-36.

g. Title IV C grant for adult basic education through the office of Indian Education. "Only groups that had been accepted as Indian were eligible." T V at 165, T VI at 35-36.

144. Another grant, given to the public school systems in the Franklin Northwest Supervisory Union situated in the Missisquoi homeland, is Title IV A, a grant for services for native American children in the public schools. T VI at 35-36.

145. In 1984-1985, the Missisquoi community was the only one in the United States to get Title IV Parts; A, B, and C funds. T VI at 35-36.

146. Other than preschool/kindergarten Missisquoi children attend the public schools of various towns in the region. T II at 144.

147. The Missisquoi are generally blended into the non-Native American work force, are generally of low income, and have a disproportionately high number of high school dropouts. T II at 147, T VI at 57-58.

148. The problems of poverty and poor education have been characteristic of the Missisquoi since the arrival of the Europeans. T IV at 97-98.

H. Genealogies

149. The testimony of John Moody establishes that all but six of the defendants, Sylvia Wells, Tammy Lee Conger, Richard Rowe, Mark Rushlow, Raleigh Elliot, and Joy Mashtare, have blood relatives traceable back to Missisquoi Abenaki living in the Missisquoi homeland prior to first European contact. T IV at 112, 119.

150. An overall reading of the testimony of John Moody establishes that the remaining defendants are looked upon as Indian by the Missisquoi Abenakis community.

I. Miscellaneous

151. A large number of local and state police officers testified in this case. From that fact and through judicial notice, we conclude that law enforcement is provided throughout the Missisquoi homeland by town, county, and state authorities. There is no evidence to suggest the existence of a Missisquoi law enforcement authority.

152. We take judicial notice of the fact that each of the towns in the Missisquoi homeland is governed in accord with Vermont State law.

153. There is no evidence to suggest that any authority other than each town provides municipal services to the Missisquoi.

CONCLUSIONS OF LAW

A. INDIAN COUNTRY.

In *State v. St. Francis*, No. 84-55, slip op. at 2 (Vt. April 14, 1989), the Vermont Supreme Court framed and briefly analyzed the issues surrounding the so-called "Indian country" defense advanced by all of the defendants:

> [i]f the defendants are Indians and if the alleged offenses occurred, as defendant's claim, in "Indian country," as that term is used in 18 U.S.C. § 1151 [-1152], the courts of this state would have no jurisdiction . . .
>
> Under the federal statute, "Indian country" is defined to include Indian reservations, 18 U.S.C. § 1151 (a), "dependent Indian communities," 18 U.S.C. § 1151 (b), and Indian allotments, 18 U.S.C. § 1151 (c). Defendants concede that there are no Indian reservations or Indian allotments in Vermont. They assert, however, that the alleged offenses all occurred within a "dependent Indian community."

Defendants in this case make the same concessions and assertions.

1. Defendants' ancestry

The testimony of John Moody has established by a preponderance of the evidence, through the presentation of meticulously prepared genealogies, that all but six of the defendants, namely Sylvia Wells, Tammy Lee Conger, Richard Rowe, Mark Rushlow, Raleigh Elliot, and Joy Mashtare are related by blood to Missisquoi Abenakis who lived in the Missisquoi homeland prior to its discovery by Europeans. His testimony, read as a whole, established that the remaining defendants are recognized as Indian by the Missisquoi Abenaki community. These defendants, therefore, meet the widely accepted definition of an Indian:

> [a] person meeting two qualifications: (a) that some of an individual's ancestors lived in what is now the United States before its discovery by Europeans, (b) that the individual is recognized as an Indian by his or her tribe or community. F. Cohen, *Handbook of Federal Indian Law* 20; *Turtle Mountain Band of Chippewa Indians v. U.S.*, 490 F. 2d 935, 942-943 (Ct.Cl.1974).

2. Origins and History

Felix Cohen tells us in his *Handbook of Federal Indian Law* that "Indian country"

> is a statutory term used for Indian lands under federal protection. The concept of a separate territory for Indians within the boundaries claimed by another sovereign date from 1763, and the term "country" was sometimes used to describe such lands. The term "Indian country" appeared in the temporary Trade and Intercourse Acts of 1790 to 1799, in the first permanent Trade and Intercourse Act of 1802, and in

the Trading House laws of 1796-1822. Cohen, *supra* at 29.

The United States Supreme Court dealt with the Indian Country concept in two early foundational cases, *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia,* 31 U.S (6 Pet.) 515 (1832). Recalling these cases in an 1885 opinion that court reflected that "in the opinions in these cases [all Indian tribes] are spoken of as 'wards of the nation', 'pupils', as local *dependent communities.*" *United States v. Kagama,* 118 U.S. 375, 382 (1885). (emphasis added).

The use of the word "dependent" in this context appears for the first time in an 1823 United States Supreme Court case: "The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in same respects as a dependent . . . people . . . " *Johnson v. M'Intosh,* 21 U.S. (8 Wheat) 543, 598 (1823).

In 1885, when the Supreme Court announced *Kagama,* "dependent" was a word that meant solely reliant on the United States government for survival basics: "Dependent for their *daily food.* Dependent for their *political rights.* They owe no allegiance to the States, and receive from them no *protection.* Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *Kagama,* 118 U.S. at 384 (emphasis added).

The phrase "dependent Indian communities" is not defined by statute. When Congress included the term it chose to codify "the decision of the United States

Supreme Court in *United States v. Sandoval*, 231 U.S. 28 (1913)." *St. Francis*, No. 84-550 at 2-3.

Cohen in his handbook agrees:

> [i]n the 1948 codification of Indian Country, Congress relied on the Supreme Court's decisions in *Donnelly, Sandoval, Pelican*,[3] and *McGowan*, even to the point of codifying the Court's phrase "dependent Indian communities." Thus the intent of Congress, as elucidated by these decisions, was to designate as Indian country *all lands set aside by whatever means for the residence of tribal Indians under federal protection*, together with trust and restricted Indian allotments. Cohen, *supra* at 34 (emphasis added).

"Dependent Indian communities" derives from that part of *Sandoval* which reads: "long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all *dependent Indian communities* within its borders." *Sandoval*, 231 U.S. at 45-46 (emphasis added).

The "lands" in *Sandoval* were twenty native American pueblos (communities of stone or adobe houses) with an aggregate population of over eight thousand. Each pueblo, on average, consisted of seventeen thousand acres, held in communal fee simple ownership. Each

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[3] "It must be remembered that the fundamental consideration is the protection of a dependent people." *United States v. Pelican*, 232 U.S. 442, 456. [sic] (1913).

pueblo was a separate and isolated community. *Sandoval*, 231 U.S. at 38-39. Congress expended federal monies

> in presenting them with farming implements and utensils and in their civilization and instruction agents and superintendents have been provided to guard their interests; central training schools and day schools at the pueblos have been established and maintained for the education of their children; dams and irrigation works have been constructed to encourage and enable them to cultivate their lands and sustain themselves; public lands, as before indicated, have been reserved for their use and occupancy where their own lands were deemed inadequate; a special attorney has been employed . . . [T]hey are dependent upon the fostering care and protection of the Government, like reservations [sic] Indians in general. *Sandoval*, 231 U.S. at 39-41.

For nearly sixty years following *Sandoval* the case law is nearly devoid[4] of any significant development concerning exercise of federal jurisdiction over dependent Indian communities. Then in 1971 the Tenth Circuit handed down *United States v. Martine*, 442 F.2d 1021 (10th Cir. 1971), making room for the expansion of jurisdiction toward as yet undefined outer limits by broadly focusing on the myriad elements of the physical and social geography of the land in issue. Referring to the federal district court trial the court stated:

> [t]he *Sandoval* case indicates that the proper approach to this problem was followed in this trial. The trial court received evidence as to the nature of the area in question, the relationship

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[4] *See United States v. McGowan*, 302 U.S. 535 (1938).

> of the inhabitants of the area to the Indian Tribes and to the federal government, and the established practice of government agencies toward the area . . . only after considering all of the various factors we have noted *as well as any other relevant factors,* can the trial court determine the status of a particular area. *The mere presence of a group of Indians in a particular area would undoubtedly not suffice. United States v. Martine,* 442 F. 2d 1021, 1023-1024 (1971) (emphasis added).

The inquiry is clearly wide ranging and "the test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standard such as percentage of Indian occupants." *United States v. Mound,* 477 F.Supp. 186, 160 (Dist. Ct. D.S. Dakota D.C. 1979).

In that spirit the courts have added other factors for our consideration. The court in *United States v. Morgan,* 614 F. 2d 166 (8th Cir. 1980) asks us to consider "cohesiveness":

> [b]asic to the definitions of "community" which we have reviewed is the existence of an element of cohesiveness. This apparently can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality. *Cohesiveness or common interests* can be more necessary to the existence of a community than can mere density of population. *United States v. Morgan,* 614 F.2d at 170. (emphasis added).

The court in *United States v. Levesque* 681 F.2d 75 (1st Cir. 1982) reviews prior cases and adds a further consideration:

> [s]ince 1948 the Eighth and Tenth Circuits have had occasion to construe the meaning of "dependent Indian community" as used in 18 U.S.C. sec. 1151. *United States v. South Dakota,* 665 F.2d 837 (8th Cir. 1981); *Weddell v. Meirhenry,* 636 F.2d 211 (8th Cir. 1980); *United States v. Martine . . . United States v. Mound . . .* these courts have concluded that section 1151(b) mandates a functional inquiry into the nature of the community in which the crime occurred, the *ultimate issue being whether the evidence shows that the area was established for the use, occupancy and protection of dependent Indians. United States v. Levesque,* 681 F.2d at 77.

This so-called "ultimate issue" "is a difficult element of the test to prove." *St. Francis,* No. 84-550 at 3.

Because our Supreme Court in *St. Francis* cites *State v. Dana,* 404 A.2d 551 (Me. 1979) as a historical example of how courts have dealt with the dependent Indian community issue, we should pause and address it here. *St. Francis* at 3. This court considers the anomalous standard announced in the case unnecessary to the result, a result which can be justified by applying the tests outlined above. The *Dana* court states

> [t]he decisions establish that . . . "dependent Indian community" will include the land in Maine now occupied by the Passamaquoddy Indians *if,* as a bona fide tribe of Indians, the Passamaquoddies inhabited that land and had "Indian title" to it in 1790 when the Indian Trade and Intercourse Act became law, and *if* the status of the Passamaquoddies and the nature of their occupancy of the land was the same when

> the instant crime was committed on it. *State v. Dana,* 404 A.2d at 562.

Internally the standard is vague. What do "status" and "nature of occupancy" mean? Externally, it would be a rare community that could fit the general thrust of the standard – a people whose world had little changed since 1790. Fortunately for the Passamaquoddy they were able to meet the standard. We agree with the opposing standard set by the Eighth Circuit: "The important consideration is what the land in question is now. . . . " *United States v. South Dakota,* 665 F.2d 837, 842 (8th Cir. 1981).

Dana is a thorn between two roses, namely *Passamaquoddy v. Morton,* 528 F.2d 370 (1st Cir. 1975) and *United States v. Levesque,* 681 F.2d at 75. *Dana* was decided by the Maine Supreme Court. *Passamaquoddy* and *Levesque* are First Circuit federal cases. All three deal with the Passamaquoddy tribe. *Passamaquoddy* comes before *Dana. Levesque* came after. Despite the notable decision in *Dana,* the *Levesque* court does not even mention it. As noted above, the *Levesque* court followed the *United States v. South Dakota, Meirhenry, Martine* and *Mound* case chain leading back to *Sandoval.* The thinking in *Dana* is creative but it only confuses the inquiry, and this court declines to resolve this case by attempting to apply its test.

The fact situation in *Levesque* is a model for a clean application of the *Martine* test which resulted in a findings of "dependent Indian community." The case was decided on

> largely unrebuffed evidence of the three key factors identified in Martine . . . nature of area . . . assault occurred . . . Peter Dana Point located within Indian Township. Except for 6000

> acres located elsewhere . . . all of Indian Township belonged to the Passamaquoddy Indians, being part of the Passamaquoddy Indian Reservation. As to . . . relationship of the inhabitant to Indian tribes, it was shown that 94 percent of the inhabits . . . were Passamaquoddy Indians . . . . As to the relationship of the community with the federal government and the practice of government agencies . . . tribe now had the status of a federally recognized tribe. *Levesque*, 621 F.2d at 78.

Compare the *Levesque* fact situation with the one in *Weddell*, where the Eighth Circuit refused to find a "dependent Indian community".

> Weddell was convicted of a grand larceny and burglary of a Coast to Coast store in Wagner, South Dakota . . . Wagner, South Dakota is located within the exterior boundaries of the original Yankton Sioux Indian Reservation. However, as a municipal corporation, Wagner is independent from the Yankton Sioux Tribe . . . only 16.3 percent of the population of Wagner is Indian. And although federal funds comprise 25 per cent of the Wagner School District budget, the district court found that funding to be proportional to the Indian student enrollment. As the petitioner points out, the Bureau of Indian Affairs office and a Public Health Service hospital located in Wagner administer various federal programs for the members of the reservation. *Weddell*, 636 F.2d at 212-213.

The court went on to say:

> [w]e agree with the district court that it would be unwise to expand the definition of a

> dependent Indian community under section 1151 to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance. Although the opportunity of Wagner is biracial in its composition and social structure, it is clearly not a dependent Indian community under any of the definitions set forth in the cases discussed above. *Weddell*, 636, F.2d at 213.

The available evidence leads this court to conclude that neither the Missisquoi homeland or any part of it is Indian country. There is no specific piece of land one can point to as being "set aside by whatever means for tribal Indians under federal protection." Cohen, *supra* at 34. The thrust of the evidence is that the Missisquoi community is thoroughly mixed if not blended into the non-native American community. Their children attend schools with non-native American children. Those who find work find it with non-native Americans. Municipal police protection is a function of Vermont State government and its subdivisions.

The issue is not whether a tribe whose roots can be traced back to pre-European contact continues to exist within the Missisquoi homeland. We have no doubt but that it does.

The evidence does not establish, however, that at this time the area is "established for the use, occupancy, and protection of dependent Indians." *Levesque*, 681 F.2d at 77. Clearly, it is established for the use, occupancy, and protection of its mixed population of Native Americans and non-Native Americans, the vast majority of whom are non-Native American. To the extent that this status lends

to cohesiveness, it is not the cohesiveness described in *Morgan*.

These native Americans have and continue to receive substantial help through various federal programs, but it cannot be said that these programs generally benefit the populous of the Missisquoi homeland as a whole. If we were to assume that the Missisquoi homeland consisted of only St. Albans, Highgate, and Swanton, the 2600 tribal members would comprise only 17.4 percent of the total population. Spread out over the entire homeland the figure would be much smaller. This court agrees that "merely because a small segment of the population consists of Indians receiving various forms of federal assistance," as here, is no reason to find the existence of a dependent Indian community. *Weddell*, 636 F.2d at 213.

The court concludes that there is no way for the defendants to meet the *Martine* test on any other acceptable standard for establishing that the Missisquoi homeland or any relevant part thereof is a dependent Indian community. As a result, the court must deny the various motions to dismiss for lack of jurisdiction.

B. ABORIGINAL TITLE

1. The Creation and Extinguishment of Aboriginal Title.

Native Americans' aboriginal title to their homelands was first recognized by the nations discovering North America and continued to be recognized by nations who

subsequently acquired possession of North American territory.[5] The United States Supreme Court has continuously recognized these rights since 1823. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 573-74 (1823). As recently as 1985, the United States Supreme Court reaffirmed the principles of aboriginal rights, also known as the aboriginal rights doctrine or doctrine of discovery. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).[6]

In *Johnson*, a seminal case on aboriginal title, the United States Supreme Court described the discovering nation's title to their new territory subject to the Native Americans' continued possession and use. It also described America's subsequent recognition of this principle:

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[5] The court will use the term "aboriginal title" to refer to Native Americans' rights to occupy and use their homeland based on their possession of the land from time immemorial. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). Although the terms "aboriginal title", "Indian right of occupancy" and "Indian title" are often used by other courts and the parties to refer to these rights, the court will confine itself to the use of the term "aboriginal tile".

The term "aboriginal rights" will be used by the court to refer to the Native Americans' rights to hunt and fish which are often included in aboriginal title. *See State v. Coffee*, 556 P.2d 1185, 1188 (1976).

[6] For future convenience the court designates the series of *Oneida* cases as follows:

Oneida I – Oneida Indian Nation v. County of Oneidas, 414 U.S. 661 (1974).

Oneida II – Oneida County, N.Y. v. Oneida Indian etc., 470 U.S. 231 (1985).

Oneida III – Oneida Indian Nation of N.Y. v. State of N.Y., 860 F.2d 1145 (1988).

discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no European could interfere. . . .

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. [between the discover [sic] and the natives].

In the establishment of these relations, the rights of original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. *They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according their own discretion;* but their rights to complete sovereignty, as independent nations were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion a power to

> grant the soil, while yet in of the the [sic] possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> The history of America, from its discovery to the present day, proves we think, the universal recognition of these principles. *Johnson*, 21 U.S. (8 Wheat) 543, 573-74 (1823) (emphasis added) *quoted with approval* in *Oneida II*, 470 U.S. at 234 n.2.

Aboriginal title is the Native Americans' right of possession, use and occupancy of land which they have inhabited from time immemorial. *See Oneida II*, 470 U.S. at 234; *United States ex rel. Hualpai Indians v Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941); *Johnson* at 574; Cohen, *supra*, at 442. The sovereign of the discovering nation held fee simple title to lands subject to aboriginal title. *Johnson* at 592; *Oneida III*, 860 F.2d at 1150 citing *Oneida II*, 470 U.S. at 234. Grants made by foreign sovereigns, as the discovering nation or its successor in interest, were still subject to aboriginal title. The grantee was said to have taken a "naked fee". *United States ex. rel. Chunie v. Ringrose*, 788 F.2d 638, 642 (9th Cir. 1986) citing *Beecher v. Wetherby*, 95 U.S. (5 Otto) 517, 525 (1877). Only the sovereign had the power to extinguish the aboriginal title which would then give the grantee full title. *Mitchel et al v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *see Oneida II*, 470 U.S. at 226; *Oneida III*, 860 F.2d at 1150.

In the period between the Revolution and the adoption of the United States Constitution, the individual states which were signatories of the Articles of the Confederation had the power to extinguish aboriginal title.

Oneida III at 1159-60. Fee simple title to land outside of the original 13 colonies was acquired by the United States, as the successor in interest to the discovering nations of France and England. *See generally Oneida I*, 414 U.S. at 661; *Oneida III*, 860 F.2d at 1160; Cohen, *supra* at 489.[7] Once the United States Constitution was adopted, the power to extinguish aboriginal title was solely in the province of the federal government. *Santa Fe* at 345; see *Oneida III*, 860. As the Court has repeatedly recognized "[u]nquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Santa Fe* at 345; *Cramer v. United States*, 261 U.S. 219, 227 (1922); *accord Cherokee Nation v. Georgia*, 30 U.S (5 Pet.) 1, 17 (1831).

Whether a particular tribe of Native Americans had aboriginal title in certain land is a question of fact dependent on whether that land was the tribe's ancestral homeland occupied by that tribe rather than land wandered over by several tribes:

> [o]ccupancy necessary to establish aboriginal possession is question of fact to be determined

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[7] Although there is disagreement about the status of Vermont during the period of 1777-1791, there is no question that Vermont was not one of the original 13 colonies. The State contends that the Republic of Vermont, in its sovereign status, held fee title to the area now known as Vermont and had the power to extinguish aboriginal title to that land. This court need not decide the issue of who held fee title to that land because even if the Republic did hold the fee, the State failed to demonstrate that the Republic intended to extinguish aboriginal title. *Post* at 91.

> as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that constituted a definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1886. *Santa Fe* at 345 (citations omitted).

The exclusive use and occupancy of a definable territory requirement for the establishment of aboriginal rights must be considered in light of the Native Americans' use of the land over the time they occupied it. "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of whites." *Mitchel* 34 U.S. at 346; *see United States v. Seminole Indians*, 180 Ct. Cl. 375, 385-86 (1967) (determination of occupancy of definable territory necessary to support aboriginal title depends on the manner of land use over a period of time with dominion over the land as the dispositive criterion).

In accordance with *Mitchel* and *Seminole*, this court's determination of whether the Missisquoi exclusively occupied and used a definable territory must be made in light of their lifestyle. The evidence established that for thousands of years, the Missisquoi inhabited a village which centered on the lower Missisquoi River and spread into the surrounding areas now known as Highgate and Swanton. FF. 97. Since 9300 B.C., the Missisquoi hunted and fished throughout the following areas, the Missisquoi

River watershed into Quebec and over to Lake Memphramagog, down into Missisquoi Bay, Alburg, the Champlain Islands, St. Albans, Swanton, Highgate, Fairfield, Fairfax, Georgia, Sheldon, Fletcher and Northern Milton. (hereinafter "Missisquoi territory"). FF. 57-61, FF. 96. There is evidence of Missisquoi cultivation in some areas since 1123 A.D. FF. 7, 60. Consequently, the court concludes that the Missisquoi's hunting, fishing, cultivation and settlements in the above named areas satisfies the occupancy and use requirement necessary to create aboriginal title in the Missisquoi territory.

The Court of Claims has considered the exclusive use and occupancy requirement as to other Native Americans. *Six Nations, etc. et al. v. United States*, 173 Ct. Cl. 899, 910 (1965). The appeals court held that the evidence relied upon by the lower court was sufficient to support its determination that the Six Nations did not have the necessary exclusive use and occupancy of a particular area. The lower court relied upon evidence that Six Nations had no settlement in the contested area or nearby, that other Native Americans lived intermittently in the area and passed through the area, that other Native Americans used the land as much or more than the Six Nations, and that the Six Nations used the area at most as a transitory passageway in common with other tribes. *Id.* at 910.

As to the exclusivity of the use of the Missisquoi territory, the court concludes that the Missisquoi occupied and used the Missisquoi territory to the exclusion of other tribes. No other tribes inhabited the Missisquoi territory or otherwise used or occupied the territory. The

Missisquoi exercised dominion and control over the Missisquoi territory to the exclusion of other tribes. FF. 8.

The State contends that Native Americans' aboriginal title has two additional elements. First, use and occupancy of the land must be exclusive of whites. Second, there must be continuous exclusive use and occupancy of the land from the establishment of the aboriginal rights until the present. The court disagrees with both of these propositions.

According to the United States Supreme Court the exclusivity element of the standard for creation of aboriginal title refers to other Native Americans not whites. As discussed previously, the *Santa Fe* Court stated that the Walapais must have occupied a definable territory exclusive of other wandering tribes. *Santa Fe* at 345. Four years later in 1945, the Court confirmed that exclusivity referred to other Native Americans. *Northwestern Bands of Shosohone Indians v. United States,* 324 U.S. 335, 338 (1945). In *Northwestern,* the Court stated that a group of Native Americans may claim aboriginal title "because of immemorial occupancy to roam certain territory *to the exclusion of any other Indians . . . " Id.* citing *Santa Fe,* 314 U.S. at 345 (emphasis added).

The Supreme Court is clear that the creation of aboriginal title is dependent in part on the Native Americans' exclusive use and occupancy of a definable territory. *Santa Fe* at 345. However, it does not follow that exclusive use and occupancy is required beyond the initial creation of aboriginal title as it is well established that once created, aboriginal title continues until extinguished by the sovereign. *See Johnson* at 585, 592; *Mitchel* at 746.

If Native Americans were required to have continuous exclusive use and occupancy of their homeland to the exclusion of whites since the establishment of aboriginal title to the present, as the State contends, there would be no aboriginal title claims. The basis of these claims is that the Native Americans have been wrongfully deprived of their aboriginal title by white encroachment at some time after the creation of the title.

One of the rights often inherent in Native Americans' occupancy rights is the right to fish. Where hunting and fishing were an integral part of a group of Native Americans' existence, the right to hunt and fish was included in their rights of occupancy. *See United States v. Winans*, 198 U.S. 371, 381 (1905) (hunting and fishing were not much less necessary to the existence of the Yakima Native Americans than the atmosphere they breathed.); *Lac Courte Oreilles Band, etc. v. Voight*, 700 F.2d 341, 352 (7th Cir. 1983). (aboriginal rights include a right to "*use* the land for the Native Americans' traditional subsistence activities of hunting, fishing and gathering."); *State v. Coffee*, 556 P.2d 1185, 1188 (1976) ("hunting and fishing are part and parcel with aboriginal title").

The Missisquoi's occupancy rights included the right to fish because fishing and hunting were at the center of the Missiquoi's culture, and they had fished in the Missisquoi territory for thousands of years. FF 58, 168. Similar to the the Yakima, fishing was as necessary to their life as the "atmosphere they breathed". *Winans* at 381. Fishing has continuously been a community preoccupation with the Missisquoi up until and through the present. FF. 60-61.

Aboriginal title and the derivative aboriginal right to fish is held by the tribe collectively and passes from generation to generation. The English considered the Native Americans' right of possession in the land they occupied as a perpetual right of possession in the tribe or nation inhabiting them as their common property from one generation to the next rather than as a right of an individual located an a particular spot. *Mitchel* at 746. Although owned by the tribe collectively, these rights were necessarily exercised by individual tribe members, consistent with their concept of property. *See* FF 31; Cohen, *supra* at 443. As discussed above, the Missisquoi had occupancy and fishing rights, and their existence as a tribe[8] permits the transmission of the fishing rights to subsequent generations. Cohen, *supra* at 443.

In accordance with the above discussion, the court concludes that the Missisquoi, as a result of their long use and occupancy of the Missisquoi territory to the exclusion of other tribes, held aboriginal title and aboriginal fishing rights in the Missisquoi territory.

It is a settled principle that Native American's aboriginal rights are "as sacred as the fee simple of whites." *Santa Fe*, 314 U.S. at 345; *Oneida II*, 470 U.S. at 235 citing *Mitchel et al. v. United States*, 34 U.S. at 746. The continued existence of Native Americans' aboriginal rights is not dependent on recognition by treaty, statute or other formal government action. *Oneida II*, 470 U.S at 236; *Cramer*, 261 U.S at 229; *United States v. Kent*, 679

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[8] The Missisquoi are a tribe for these purposes. *See* FF. 64, 69-71; *infra* at 44.

F.Supp. 985, 987 (E.D. Cal. 1987); *Lipan*, 180 Ct. Cl. at 492. Aboriginal rights are "entitled to the respect of all courts until it (they) should be legitimately extinguished . . . " *Johnson*, 21 U.S. at 592; *see Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 405, 420 (1832).

Aboriginal rights are not perpetual; they may be extinguished by a number of different methods. Extinguishment can be accomplished by "treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy or otherwise." *Santa Fe*, 314 U.S. at 347 citing *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). However, notwithstanding the method of extinguishment, that a predecessor sovereign or Congress intended the extinguishment of aboriginal title must be clear and unambiguous. *Santa Fe* at 345-46, 353; (no clear and plain indication that Congress intended to extinguish aboriginal title); *United States v. Gemmill*, 535 F.2d 1145, 1147 (9th Cir. 1976) (government must clearly intend to extinguish aboriginal title); *Lipan* at 492 (citations omitted) ("While the selection of the means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous.") The requirement that extinguishment must be clear and unambiguous is apparent from the often cited rule that extinguishment will not be lightly implied. *Menomiee Tribe v. United States*, 391 U.S. 404, 413-14 (1968) (the intention of Congress to extinguish aboriginal rights will not be "lightly imputed"). *Santa Fe* at 354 "[(A)n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards"]; *accord Gemmill* at 1147; *Gila River Pima Maricopa Indian Commission v. United States*, 494 F.2d 1386, 1391 (Ct. Cl. 1974);

Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 946 (Ct. Cl. 1974).

Extinguishment can also be accomplished by Native Americans' abandonment of their rights or by their cession of their rights. *Mitchel,* 34 U.S. at 746. "Abandonment" is defined as "the surrender or cession of property or rights; voluntary relinquishment." Black's Law Dictionary 2 (1979). The Missisquoi, however, never voluntarily abandoned any portion of their the Missiquoi territory. FF. 56. The State's contention that the Missisquoi ceded their title and rights in the Missisquoi territory is addressed in section 2.

The State contends that this court cannot inquire into the means or the proprietariness of the act asserted to extinguish aboriginal title. The State is correct that "[t]he manner, method and time of such extinguishment raise political not justiciable, issues", and the justness of an extinguishment is not open to inquiry in the courts *Santa Fe* at 347. Rather, the only issue this court is concerned with is whether any one of the various sovereign's actions clearly imply the sovereign's intent to extinguish aboriginal title. See *United States v. Gemmill,* 535 F.2d 1145, 1148 (9th Cir. 1976) (the relevant question is whether governmental action was intended as extinguishment not whether this extinguishment was effected by permissible means). Accordingly, court is only concerned with whether or not extinguishment occured.[9]

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[9] This court concludes that whether or not extinguishment occured is a justiciable question based on the precedent of the numerous courts who have decided this question. United States courts have adjudicated claims involving Indian claims and

The State also contends that that a sovereign state must have recognized aboriginal title or rights prior to the states' admission to the union if they are to be afforded federal protection. The cases cited by the State for this proposition are either distinguishable or against the weight of authority. The weight of authority takes a nearly opposite approach. As the court noted earlier, aboriginal title and rights, once established in fact, exist until extinguished or abandoned. *Infra* at 54-55. As one court stated, in discussing the proper posture in which to view aboriginal rights in relation to a sovereign republic not yet admitted to the Union, "Indian title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival. . . . The correct inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights." *Lipan* 180 Ct. Cl. at 492.

The State argues that extinguishment of aboriginal rights can be accomplished by government acts and policies which imply the governments' intent that the land be used for purposes contrary to the Native Americans'

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extinguishment where the argument is that extinguishment occured prior to the adoption of The United States Constitution; *see Mitchel; United States v. Clarke,* 33 U.S. (8 Pet.) 436 (1834); *United States v. Arredondo,* 31 U.S. (6 Pet.) 691 (1832), *Johnson;* and several cases where extinguishment allegedly occured before the Constitution was applicable and again, after the Constitution was applicable. *See Oneida II; Oneida I; Santa Fe; United States v. Dann,* 706 F.2d 919 (9th Cir. 1983) *rev'd on other grounds* 470 U.S. ___ (198___); *United States v. Atlantic Richfield Co.,* 435 F.Supp 1009 (1977); *Lipan;* 180 Ct. Cl. 492.

possessory rights in accordance with the *Santa Fe* Court's statement that extinguishment could be accomplished by the "exercise of complete dominion adverse to the right of occupancy." *Santa Fe,* 314 U.S. at 347. Although the cases cited by the State do support the proposition that government intent to extinguish can be implied from such acts, nearly all of the courts relied on a series of acts to ensure extinguishment was intended. *United States v. Gemmill* 535 F.2d 1145 (9th Cir. 1976); *United States v. Kent,* 679 F.Supp. 985 (E.D.Cal. 1987). This reliance indicates that the courts were not convinced that a grant of land which was adverse to aboriginal rights qualified as an act which clearly and unambiguously implied the sovereign's intent to extinguish aboriginal title and rights. *See Gemmill* at 1149 (any one of these actions, including a designation of the land as federal reserve land, is insufficient by itself to unequivocally demonstrate extinguishment).

Although the *Kent* and *Gemmill* courts did consider governmental inclusion in federal forest reserves of land subject to aboriginal rights as one factor in determining whether aboriginal rights were extinguished, neither of the courts held that extinguishment was implied from that factor alone. In *Kent,* the court also considered the tribe's failure to make a timely claim under a federal statute and compensation to the tribe for the land. *Kent* at 987. In *Gemmill,* the court considered the additional factors of numerous concentrated military actions by the government against the Indians over a period of time, and it resolved any remaining ambiguity about extinguishment by focusing on congressional payment to the Indians for their claim. *Gemmill* at 1148-49.

The one case that did find an implied intent to extinguish solely by inclusion of the land in a forest reserve, *Ute Indian Tribe v. State of Utah,* 716 F.2d 1298 (10th Cir. 1983), relied on an interpretation of a case later rejected by the court which decided it. *United States v. Dann,* 706 F.2d 919 (9th Cir. 1983) *rev'd on other grounds* 470 U.S. ___ (198___). In *Dann,* the government claimed that aboriginal rights to land had been extinguished by application of public land laws, creation of the Duck Valley Reservation for the tribe of the individuals making the claim and the administration of the land pursuant to the Taylor Grazing Act for over 35 years. In part, the government argued that inclusion of the land in a grazing district was similar to inclusion of land in a forest reserve and it should have the same effect of extinguishment as inclusion in a forest reserve had in the previous *Gemmill* case. *Id.*

The Court of Appeals for the Ninth Circuit rejected the government's argument that the *Gemmill* ruling stood for the proposition that inclusion of aboriginal lands within a national forest extinguishes aboriginal title. *Id.* at 932-33. The *Dann* court relied on its statement in *Gemmill* that "any one these actions, examined in isolation, may not provide an unequivocal answer to extinguishment." *Id.* citing *Gemmill* at 1149. The *Dann* court concluded that extinguishment had not occured, reasoning that any one of or the combination of circumstances in *Dann* – the application of homestead laws, the creation of the Duck Valley Reservation and the inclusion of the disputed aboriginal land in a grazing district – were not comparable to the circumstances in *Gemmill.* In *Gemmill,* the Indians had been removed from the land by force 100

years earlier, and the land was subsequently used continuously for recreation and conservation purposes. *Dann* at 932-33.

Consequently, to find extinguishment, the *Dann* court required that the governments' intent to extinguish be *clearly* implied by the government act(s) of granting land for other uses which were subject to aboriginal rights. Accordingly, this court will require that if extinguishment of aboriginal rights is to be implied from government acts where land subject to aboriginal rights is granted for use adverse to the possession of Native Americans', such an act must clearly[10] and unambiguously[11] imply the government's intent to extinguish aboriginal rights.[12]

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[10] "Clear" is defined as "free from uncertainty or doubt". New Webster's Dictionary 187 (1981).

[11] "Ambiguous" is defined as "[d]oubtful or uncertain; likely to be interpreted two ways; equivocal." *Id.* at 32. The court will consider "unambiguous" to be the converse of "ambiguous", i.e. certain; likely to be interpreted one way or unequivocal.

[12] The State suggests that something less is required to extinguish aboriginal rights not recognized by treaty than those that are recognized by treaty or statute. The court concludes that the only distinction in extinguishment between recognized aboriginal rights and and non-recognized aboriginal rights is that extinguishment of the first requires compensation while extinguishment of the later does not. *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955); *Wahkiakum Band of Chinook Indians v. Bateman,* 655 F.2d 176 (9th Cir. 1981). Because neither treaty rights or compensation are at issue *sub judice,* the court finds this distinction irrelevant.

In accordance with this court's Order of December 21, 1988, the State has the burden to prove extinguishment of the Missisquoi's aboriginal title by the preponderance of the evidence. *State v. St. Francis*, Docket No. 1171-10-86Fcr, etc. Order of December 21, 1989. Therefore, the issue before this court is: Has the State met its burden of proving extinguishment by the preponderance of the evidence, by demonstrating an act or acts, legislative or otherwise, which either expressly state or clearly and unambiguously imply that England, the Republic of Vermont or the United States, as the reigning sovereign, intended to extinguish the Missisquoi's aboriginal rights in the Missisquoi territory?

The court has carefully considered each of the State's arguments on the standard for extinguishment and rejects those inconsistent with the above standard.

The State has not asserted, and this court has not found, that any sovereign has made an express statement that it intended to extinguish the Missisquoi's aboriginal rights in the Missisquoi territory. FF. 105, 129. Therefore, the court will focus on whether any sovereign engaged in any act or acts which clearly and unambiguously apply the sovereign's intent to extinguish the Missisquoi's aboriginal rights in the Missisquoi territory.

The State's Extinguishment argument is comprised of three major points: I) aboriginal title was extinguished while Vermont was under the territorial control of England, II) aboriginal rights were extinguished by the Republic of Vermont as a sovereign before Vermont entered the Union, and III) the Vermont Constitution extinguished any aboriginal right to fish.

2. Extinguishment of Aboriginal Title by the English.

The State did not prove by the preponderance of the evidence that the English sovereign, while in control of the Missisquoi territory, engaged in any act which clearly implied that the English sovereign intended to extinguish the Missisquoi's aboriginal rights to the Missisquoi territory. Specifically, the following acts did not clearly imply the English sovereign's intent to extinguish the Missisquoi's aboriginal rights: a) the 1763 Wentworth grants, b) the 1766 meeting at Isle La Motte and c) the New York governors' grants to Simon Metcalfe and the proprietors of the the [sic] Prattsburgh grant. Nor was extinguishment accomplished by any of the other acts asserted by the State.

a) Governor Wentworth's 1763 grants:

First, the court considers whether Governor Wentworth's three August 1763 grants of land within the Missisquoi territory are acts clearly and unambiguously implying the English sovereign's intent to extinguish the Missisquoi's aboriginal rights in their Missisquoi homeland. The three grants, commonly known as the Swanton grant, the Highgate grant and the St. Albans grant, will be addressed collectively as "Governor Wentworth's grants" hereinafter. FF. 115.

The State concedes, although official acts within the subject matter jurisdiction bestowed upon an official are binding, a challenge to the act may be made on the basis that the official acted beyond his authority. *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 729 (1832). *See also,*

United States v. Clark, 33 U.S. (8 Pet.) 436, 451-2 (1834) (although a grant, if an act within a public officer's duty as assigned by king, is *prima facie* within his power, the Court would still hear argument that grant was invalid because officer acted beyond the power conferred upon him.) Therefore, this court can review whether or not Governor Wentworth's grants were within his authority, as a question of whether of extinguishment occured [sic], without treading on nonjusticiable matters.

Governor Wentworth's authority was limited, in part, by England's Native American policy as manifested in several royal communications. FF. 114. If Governor Wentworth's grants were consistent with his authority as limited by this policy, his grants could conceivably be considered to imply English intent regarding Native American matters. If, however, Governor Wentworth's grants are not consistent with his authority in that they violated England's Native American policy, then this court cannot consider Governor Wentworth's grants as acts which implied English intent regarding Native American matters. This court concludes that Governor Wentworth's grants were not within his authority as limited by English Native American policy, and therefore, are not acts which imply English intent much less acts which clearly imply the English sovereign's intent to extinguish the Missisquoi's aboriginal title to the Missisquoi territory. Because the question of whether Governor Wentworth's grants extinguish aboriginal title is resolved by the English Native American policy's limitations on the Governor's authority to grant land, this court need not decide whether the Missisquoi territory was located

outside the geographic boundaries of the Governor's jurisdiction in 1763 and thereby, beyond his authority.

English policy towards Native Americans originates with the Articles of Capitulation, is later reflected in the 1763 Treaty of Paris, and is subsequently manifested by a general Native American policy formally set out in a royal proclamation and royal instructions. In commenting on English relations with Native Americans, the United State's Supreme Court stated:

> [o]ne uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the land they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation, not as the right of individuals located on particular spots. *Mitchel*, 34 U.S. at 744.

As the Missisquoi were not enemies of the English, this uniform rule generally describes the English attitude towards the Missisquoi and the land they occupied.[13]

England's formal relationship with the Missisquoi was first defined by the Articles of Capitulation. The Articles of Capitulation, signed in 1760, marked the end of hostilities between the French and the English in the

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[13] Although the Missisquoi sided with the French during the French and Indian War, after the French defeat and the English succession to power in 1763 there is no evidence that the English viewed the Missisquoi as unfriendly.

French and Indian War.[14] FF. 107. In accordance with Article XL, the English agreed that the Native American allies of the French King would be maintained in the lands they inhabited and not be molested for their support of the French King. FF. 107. The Missisquoi, as allies of the French King, fall within the protection of Article XL. *Id.* Under the Articles of Capitulation, the English were bound to treat the Missisquoi honorably and fairly. *Id.* Therefore, from the start of their formal relations with the Missisquoi, the English agreed to maintain the Missisquoi in their Missisquoi homeland, treating them honorably and fairly.

The Articles of Capitulation were followed up by the 1763 Treaty of Paris, which formally ended the French and Indian War. FF. 108. The 1763 Treaty of Paris had the same purposes as the Articles and dealt with the Missisquoi and their homeland in the same manner. *Id.*

In the mid 18th century, the English formulated a general Native American policy that is prescribed in a royal proclamation, royal instructions and directions. FF. 110. The Crown learned from both its own and France's experience that peaceful relations with the Native Americans were necessary to the colonies' security and consequently, in the Crown's best interest. FF. 110-13.

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[14] The French were the "discoverers" of the Missisquoi territory and, therefore had the power to extinguish aboriginal rights. Although there was some evidence that French grants were made in the Missisquoi territory, the State did not assert that extinguishment occured [sic] under the French reign. Consequently, the Missisquoi's aboriginal rights were intact when England acquired the French territory which included the Missisquoi homeland.

Motivated by its interest in avoiding conflict with the Native Americans, the Crown wanted to ensure that any acquisition of Native American land be carried out in an orderly fashion, by specific procedures, including treaties made by assemblies of the affected Native Americans. FF. 110, 112-13. Apparently, the Crown also sought to maintain peaceful relations with the Native Americans by explicitly reserving land for them and protecting those rights from encroachment. FF. 112-13. *See Johnson*, 21 U.S. at 597. (England attempted to preserve peace with the Indians by quieting their alarms about their property by restraining white encroachment).

Royal communications by the Crown, including the Royal Instructions of 1761 and the Royal Proclamation of 1763, expressed this policy. FF. 112-13. The Royal Instruction of 1761 and the Royal Proclamation of 1763 had the effect of law in the colonies. *See, United States v. Arredondo*, 31 U.S. (6 Pet.) 691 at 713 (1832) (the instructions of the king to his governors are the supreme laws of the conquered colony, and a royal order form [sic] the king is the supreme law superseding previous inconsistent ones.) Both the Royal Instruction and the Royal Proclamation prohibited royal governors, including Governor Wentworth, from making grants to certain lands. *Id.*[15] Consequently, royal governors' grants were within their authority only if they were consistent with the Royal Instruction and the Royal Proclamation.

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[15] Dr. Calloway also concluded that Governor Wentworth's authority to grant land was restricted by the Royal Instruction of 1761 and the Royal Proclamation of 1763. C I *at* 93; *C III at* 80-2.

The Crown's 1761 Royal Instruction to several royal governors, including those of New Hampshire and New York, manifests England's Native American Policy and is applicable to the the [sic] Missisquoi in their Missisquoi homeland. FF. 110-13. The Instruction recognized that the safety of the colonies was jeopardized by improper claims on Native American land and vowed to "support and protect the Indians in their just rights and possessions . . . " FF. 112. The Instruction prohibited governors from granting "any land within or adjacent to territories possessed or occupied by the said Indians or the property or possession of which has at any time been reserved or claimed by them;" *Id.*

There is no question that the Missisquoi occupied the Missisquoi territory prior to, during and after 1763.[16] Therefore, Governor Wentworth's grants of the Missisquoi territory, as grants of land occupied by Native Americans, where contrary to the Crown's 1761 Royal

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[16] Both parties and Dr. Calloway use the the [sic] word "vacant" to refer to land not occupied by Native Americans. This use of the word, however, invites confusion as the word apparently had a technical meaning in English Native American policy. *See Johnson* at 595-96 (in the context of the authority of the Crown, there was no distinction between vacant lands and lands occupied by Native Americans). Consequently, consistent with the language of the 1761 instruction, the court will use "not occupied" or "unoccupied" to describe territory where Native Americans did not reside. Blacks Law Dictionary defines "occupy" as "to hold possession of; to tenant. Actual use, possession and cultivation." Blacks' Law Dictionary 974 (5th ed. 1979). The New Webster's Dictionary defines "occupy" as "to inhabit or to be a dweller in". The New Webster's Dictionary 656 (1981).

Instruction and thereby English law and policy. Because Governor Wentworth's grants violated English law and English Native American policy, the grants cannot be considered as consistent with the Governor's authority. The grants, as acts beyond Governor Wentworth's authority, cannot imply the English sovereign's intent. Consequently, the Wentworth grants are not acts which clearly and unambiguously imply the English sovereign's intent to extinguish the Missisquoi's aboriginal title.

The State contends that Governor Wentworth had the authority to grant the land and having made the grant, this court has no jurisdiction to review the the [sic] validity of the Governor's grants based on his determination that the Missisquoi territory was unoccupied. The case cited by the State for the proposition that Governor Wentworth's grants were within his authority is unpersuasive as it deals with Governor Wentworth's 1741 grants and addresses whether those grants conveyed private rights to the Conneticut [sic] river bed rather than the scope of the Governor's authority to make grants of land occupied by Native Americans. *New Hampshire Water Resources Board v. Lebanon Sand and Gravel, Inc.*, 233 A.2d 828, 829 (N.H. 1967).

The State argues that this court has no jurisdiction to hear argument on the correctness of the Governor's determination prior to the grants that the Missisquoi territory was unoccupied because there is a very strong, if not irresistable [sic], presumption that everything preceding a grant has been rightfully and lawfully performed, citing *Mitchel et al. v. United States*, 34 U.S. (9 Pet.) 711

(1835). Although *Mitchel* is good authority for the presumption of lawfulness, it is not authority for the proposition that this court has no jurisdiction to determine whether Governor Wentworth was authorized to make the grants.

As to the presumption of the lawfulness of Governor Wentworth's grants, specifically the requisite determination that no Native Americans occupy the granted lands, the court concludes that the presumption is defeated. Grants made by governors are *prima facie* evidence that the governor had not exceeded his powers in making the grant. *United States v. Clark*, 33 U.S. at 449. Under the Royal Instruction of 1761, a grant within the power of the governor would be a grant to land that was not occupied or possessed by Native Americans. Although the grant itself may provide a legal presumption or *prima facie* evidence that the prerequisite of no Native American occupancy had been satisfied, the evidence of the Missisquoi occupancy outweighs the presumption and defeats the *prima facie* case.

There is substantial evidence that the Missisquoi occupied the Missisquoi territory prior to 1763. FF. 7, 9, 15, 18, 20, 26, 27 and 34. An English military map shows the location of the Missisquoi Village in 1762. FF. 28. There is no evidence that Governor Wentworth ever had the Missisquoi territory surveyed to determine whether it was unoccupied by Native Americans. FF. 108. The grants themselves do not state that the land was unoccupied. FF. 115. In fact, when another royal governor was petitioned for a grant to the Missisquoi territory, the governor refused to make the grant when the survey commissioned reported that the Missisquoi territory was occupied by

Native Americans. FF. 117. As a result, the court concludes that the presumption of the requisite of no occupation by Native Americans is rebutted by uncontrovertable evidence of Missisquoi occupancy of the Missisquoi territory.

However, even if the presumption is controlling, the Crown's subsequent, functional revocation of the Wentworth grants demonstrates that Governor Wentworth's grants were beyond his authority. In *Arredondo,* the case upon which *Mitchel* relies, the United States Supreme Court addressed the authority of the royal governors to grant land. *United States v. Arredondo,* 31 U.S. (6 Pet.) 691, 728 (1832). The Court stated that grants of the royal governors would be considered to be evidence of their authority to make the grants and the assent of the king in the *absence* of any evidence of "disavowal, revocation or denial by the king." *Id.* (emphasis added). Both the Royal Proclamation of 1763 and the 1764 Royal Order functionally revoke Wentworth's grants, indicating that Governor Wentworth lacked the authority to make the grants. FF. 113,[17].

The Royal Proclamation of 1763, made two months after the Wentworth grants, functionally revokes the Governor Wentworth's grants.[18]. The Royal Proclamation of

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[17] A king's royal order is a supreme law, superseding and repealing all other preceding ones inconsistent with it. *Arredondo* at 713. The King issued the Royal Proclamation of 1763. FF. 113.

[18] Even though the Proclamation was issued after the grants were made, the law reflected therein simply adopted the already existing law of New Hampshire regarding Native

1763 repeats England's Native American policy, defines the land reserved to the Native Americans and requires any who have settled on the reserved land to vacate the land, thereby functionally revoking grants made of reserved land. FF. 113. *See also Johnson* at 594.

Recognizing that it was in the Crown's best interest and necessary to the colonies' security that the Native Americans' possession of their lands not be disturbed, the Proclamation expressly stated that certain lands, having not been purchased or ceded to England, were reserved for the use of Native Americans as hunting grounds. FF. 110, 113. The Proclamation defined the lands reserved to the Native Americans. The eastern boundary of the land reserved to the Native Americans, known as the Proclamation Line, is the Green Mountains. *Id.* Consequently, the Missisquoi territory is located within lands reserved to the Native Americans by the Royal Proclamation of 1763. *Id.*

Having defined the land reserved to the Native Americans, the Proclamation functionally revoked any grants that had already been made to that land. The Proclamation required that any person who had, willfully or inadvertently, settled on land reserved to Native Americans, vacate that land immediately. FF. 113. Thus, it can be inferred that even if one had settled on the land reserved to the Missisquoi pursuant to a Wentworth

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American land issues. *Mitchel*, 34 U.S. at 745-46. Therefore, even prior to the Proclamation, under the law of New Hampshire the Missisquoi's aboriginal rights in the Missisquoi territory were respected and continued until abandoned, ceded to the government, or sold in an authorized sale. *Id.*

grant, they were required to vacate the land[19] and that the Missisquoi's aboriginal rights remained intact.

Additionally, the 1764 King's Order also functionally revokes the Wentworth grants. FF 116. With the advice of his Privy Council, the King ordered that the boundary between New York and New Hampshire would be the Connecticut River, ending the two provinces' long dispute over who had jurisdiction to grant land east of the Conneticut [sic] River. Scholars interpret this order to overturn the Wentworth grants, although the grants are not mentioned by name. FF. 116.

Therefore, even if the Wentworth grants were presumed valid at their inception, their subsequent functional revocation by the King by the Royal Proclamation of 1763 and the King's Order of 1764 demonstrate that Governor Wentworth's grants were beyond his authority. *See Arredondo* at 728. Because Governor Wentworth's grants were beyond his authority, as demonstrated by their functional revocation by superseding law, this court cannot conclude that the Wentworth grants were acts which clearly and unambiguously imply the English sovereign's intent to extinguish the Missisquoi's aboriginal title in the Missisquoi territory.

Furthermore, the proposition that Governor Wentworth's grants were beyond his authority is further supported by Vermont's Declaration of Independence. The Declaration's explicit ratification of the Wentworth

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[19] Dr. Calloway agrees with the court that the effect of the Royal Proclamation of 1763 was to invalidate the Wentworth grants. C I at 100-1.

grant's is in itself an admission that the validity of the grants were in question. FF. 125.

The State contends that even if the grants were invalidated, the Defendants failed to prove that aboriginal title was resurrected as a matter of fact and law. The court will not address the proposition that Defendants must prove a resurrection of aboriginal title because the State cites no authority for this proposition. More importantly, the court sees no point in requiring the Defendants' to meet such a burden when the purpose of reviewing the grants is to determine whether they were acts clearly and unambiguously applying the English sovereign's intent to extinguish the Missisquoi's aboriginal title in the Missisquoi territory. We have concluded that they were not.

Finally, even if the court did conclude that the grants were within Governor Wentworth's authority and were not revoked, the grants would have been made subject to the Missisquoi's aboriginal title and rights. *See Johnson,* 21 U.S. at 573-74 (European nations respected the rights of natives as occupants even though they asserted ultimate dominion to grant land and made land grants that conveyed title to the grantees, the grants were understood by all to be subject to the Indian right of occupancy.); *Mitchel,* 34 U.S. at 746 (subject to the Indian's right of possession of land they occupied, the ultimate fee was in the crown and that fee could be granted while the land remained in the possession of Indians). Governor Wentworth's grants, by the acts themselves, are insufficient for this court to conclude that they clearly and unambiguously imply England's intent to extinguish the Missisquoi's aboriginal title in the Missisquoi territory.

b) The 1766 Isle La Motte Events.

The State contends that the Isle La Motte meeting in 1766, resulted in a cession of the Missisquoi territory, and the English's subsequent treatment of the events as a cession are yet other acts demonstrating extinguishment of the Missisquoi's aboriginal title and rights to the Missisquoi territory. According to the State, the English accepted that the Caughnawauga had the authority to cede the Missisquoi territory, and the Caughnawauga's cession extinguished aboriginal rights in the Missisquoi territory. Because the method, manner and time of extinguishment are not justiciable issues, contends the State, this court cannot not now question whether extinguishment occured [sic]. *Santa Fe* at 347. Furthermore, if the court does make a determination of whether extinguishment occured [sic], the court should look to England's attitude toward the land after the cession as demonstrated by subsequent events. Subsequent events such as the Metcalfe and Prattsburgh grants, the asserted policy of the English officials to settle the Missisquoi at Odanak and statements by English Indian agent Claus indicate the English believed that the Native Americans ceded the Missisquoi territory to the English. The court concludes that neither the Caughnawauga nor the Missisquoi ceded the Missisquoi territory to the English at Isle La Motte, thereby accomplishing extinguishment.

In September of 1766, the governor of Quebec, Governor Murray, and the governor of New York, Governor Moore, met on Isle La Motte, an island on Lake Champlain. FF. 37. The primary purpose of the meeting was to set the boundary between New York and Quebec at the 45th parallel. *Id.* Also attending the meeting were Daniel

Claus, a deputy of the Indian Affairs office, Caughnawauga Native Americans and some of the Missisquoi. *Id.* The Missisquoi complained about settlers on their land. FF. 38. The Caughnawauga claimed a right to the same land on the Eastern shore of Lake Champlain (now known as Vermont) by virtue of their descent from ancient Mohawks who had frequented the area.[20] *Id.* Apparently as a protest to the Caughnawaugas' claim of right to the land, the Missisquoi made a statement that they had inhabited the land since "time unknown to anyone here present" and no others had laid claim to it with the exception of a French request to locate a saw mill there. FF. 38. The Caughnawauga ceded any claims to the land that they had to the English, retaining only hunting and fishing rights in the area. *Id.* There was some evidence that Claus considered the cession by the Caughnawauga to operate as cession of Native American possessory rights in the the [sic] Missisquoi territory to the English. FF. 38.

As stated previously, this court does have jurisdiction to determine whether extinguishment of the Missisquoi's aboriginal rights occured [sic]. *Infra* at 61-62. A determination of whether extinguishment of the Missisquoi's aboriginal rights occurred in this instance requires a determination of whether the Missisquoi ceded the Missisquoi territory to the English. Whether the Caughnawauga purported to cede the Missisquoi territory is

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[20] The Iroquois nation was a confederacy of Native American tribes including the Mohawks. FF.37. The eastern boundary of the Iroquois nation is Lake Champlain. FF. 94. The Missisquoi were not part of the Iroquois nation.

irrelevant as they had no rights in the Missisquoi territory to cede. that extinguishment of the Missisquoi's aboriginal rights in the Missisquoi territory occured [sic] as the result of a cession to the English. [sic]

A cession is defined as "a relinquishment of property rights". Blacks' Law Dictionary 208 (1979). Therefore a cession inherently requires that the ceding party hold the property rights. One who does not have property rights cannot cede those rights, consistent with the basic legal concept that one cannot convey what one does not have. Here, the Caughnawauga, as part of the Iroquois nation, had no rights in the Missisquoi territory. FF. 8, 94, 95. That the English chose to believe the Caughnawauga had rights in the Missisquoi territory cannot change the facts. Only the Missisquoi occupied the Missisquoi territory and as a result, only the Missisquoi had the power to cede any rights derived from that occupancy.

There is insufficient evidence for the court to conclude that the Missisquoi ceded any rights they had in the Missisquoi territory to the English at Isle La Motte in 1766. The evidence regarding the Missisquoi is that they claimed to be the only rightful occupants of the Missisquoi territory and that they objected to white settlers on their land. FF. 38. There is no evidence of the Missisquoi's agreement to cede any rights, there is no indication of a purchase and the Missisquoi's continued assertion of rights in the area indicate they did not cede their rights. As a result, there is insufficient evidence to prove by a preponderance of the evidence that the Missisquoi relinquished their occupancy rights in the Missisquoi territory.

Nor does the court conclude that the evidence of the meeting at Isle La Motte proves by the preponderance of the evidence acts clearly and unambiguously implying the English sovereign's intent to extinguish the Missisquoi's aboriginal rights in the Missisquoi territory. The primary purpose of the meeting was to set the boundary between New York and Quebec. There is insufficient evidence for the court to conclude that the only Native Americans who had occupancy rights to cede, the Missisquoi, did cede their rights. Furthermore, that a deputy of the Indian Affairs Office considered the event to operate as a cession is not an act clearly and unambiguously implying the sovereign's intent to extinguish the Missisquoi's aboriginal rights in the Missisquoi territory. Nor can the State's assertion that the English assumption of cession, alleged to be demonstrated by subsequent English governors' grants of the Missisquoi territory, clearly and unambiguously imply the sovereign's intent to extinguish the Missisquoi's aboriginal title.

In accordance with the above discussion, this court cannot conclude that the State has demonstrated by a preponderance of evidence that a meaningful cession occured [sic] or that the events at Isle La Motte constituted an act clearly and unambiguously implying the English sovereign's intent to extinguish the Missisquoi's aboriginal title in the Missisquoi territory. Consequently, the events at Isle La Motte did not extinguish the Missisquoi's aboriginal rights in the Missisquoi territory.

c) The Metcalfe and Prattsburgh Grants.

The Metcalfe and Prattsburgh grants are not acts clearly and unambiguously implying the English sovereign's intent to extinguish the Missisquoi aboriginal title in the Missisquoi territory. In 1768, the royal governor of New York, Henry Moore, made the Metcalfe grant. FF. 121. In 1777, a subsequent New York royal governor, John Earl of Dunmore, made the Prattsburgh grant adjacent to the Metcalfe grant. *Id.* The two grants roughly included the lands covered by the previous Wentworth grants. *Id.* At the time of the later grant, the Prattsburgh grant, the Proclamation Line set out in the Royal Proclamation of 1763 was still in effect. FF. 120. West of the Proclamation line, the Indian Affairs office had jurisdiction to implement Native American Policy and east of the Line, the royal governors had jurisdiction. FF. 114. Because the Missisquoi territory is located west of the Proclamation line, New York's royal governors did not have authority to make the grants.

Furthermore, the Metcalfe and Prattsburgh grants violated English policy set out in the Royal Proclamation of 1763. Under the Royal Proclamation, English governors could only acquire Native Americans' land with their agreement and by holding an open, public meeting attended by the Native Americans and the governor of the area. FF. 113, 114. Because the Proclamation had the effect of law, this process was required. *See, Arredondo,* 31 U.S. at 713. There was no evidence that the Native Americans occupying the area, the Missisquoi, ever agreed to cede their land or attended an open meeting for that

purpose. FF. 110, 121. Therefore, the Metcalfe and Prattsburgh grants, being in violation of English law, were beyond the governors' authority.

As covered in the discussion above concerning Governor Wentworth's grants, where a governor makes land grants beyond his authority, the grants are not acts which clearly and unambiguously imply the English sovereign's intent to extinguish the Missisquoi's aboriginal title in the Missisquoi territory. *Infra* at 62.

Even if this court did conclude that the grants were within the New York Governors' authority, the grants would have been made subject to the Native American's aboriginal rights. *See Johnson*, 21 U.S. at 573-4 (European nations respected the rights of natives as occupants even though they asserted ultimate dominion to grant land and made land grants that conveyed title to the grantees, the grants were understood by all to be subject to the Indian right of occupancy.); *Mitchel*, 34 U.S. at 746 (subject to the Indian's right of possession of land they occupied, the ultimate fee was in the crown, and that fee could be granted while the land remained in the possession of Indians).

The New York governors' grants, by the acts themselves, are insufficient for this court to conclude that they are acts which clearly and unambiguously imply England's intent to extinguish the Missisquoi's aboriginal rights in the Missisquoi territory.

The court has carefully considered all of the State's arguments that the Missisquoi's aboriginal title and rights in the Missisquoi territory were extinguished while the English controlled the territory and concludes that they

are insufficient to demonstrate extinguishment by the preponderance of the evidence.

3. Extinguishment of Aboriginal Title by the Republic of Vermont.

The State contends that even if the Missisquoi's aboriginal title and rights were not extinguished under England's reign, the Republic of Vermont extinguished aboriginal title and rights by the following three acts: 1) the 1777 Vermont Constitution's ratification of the Wentworth grants, 2) statutes passed by the Republic of Vermont; and 3) the enemy status accorded the Missisquoi. The parties made a considerable effort to convince the court of Vermont's status as an independent republic from when it declared itself independent in 1777 through 1791, when it joined the Union. Control of the area now known as Vermont was claimed by the alleged Republic of Vermont, by the British until 1783 and by New York until 1790. The question of whether Vermont was a Republic with sovereign rights during the period of 1777 to 1791 need not be resolved by this court. Even assuming *arguendo* that Vermont was a Republic with sovereign rights, the State did not demonstrate acts of the Republic which clearly and unambiguously imply the Republic's intent to extinguish the Missisquoi aboriginal title in the Missisquoi territory.

First, the State argues that the Republic of Vermont's 1777 Constitution extinguishes the Missisquoi's aboriginal rights by the Constitution's ratification of the Wentworth grants. Although it is true that the Vermont Constitution recognizes the Wentworth grants as a valid

basis for land claims in Vermont, this in itself, does not accomplish extinguishment. The Wentworth grants were made subject to aboriginal title and rights and there is nothing to indicate that Vermont's reaffirmation of those grants abrogated those rights. Furthermore, if the Constitution's ratification of the grants are treated as grants made by the Republic, they must be considered as grants made subject to aboriginal rights absent an act clearly and unambiguously implying the Republic's intent to extinguish aboriginal rights. *Oneida II*, 470 U.S. at 234; *Johnson* at 543; see, *Lipan*, 180 Ct. Cl. at 492-93 (absent a convincing demonstration to the contrary, the Republic of Texas was considered to have adhered to the general principles of the rest of the western world in its treatment of Native Americans, including the proposition that extinguishment of aboriginal title requires a plain and clear indication that the Republic ended the Lipan Apaches' rights in their ancestral lands.)[21] Therefore, the ratification of the Wentworth grants as a proclaimation of validity of the claims dependent on the grants is not an act that clearly and unambiguously implies the Republic of Vermont's intent to extinguish the Missisquoi's aboriginal title and rights in Missisquoi territory.

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[21] The State contends that Governor Wentworth made a determination that aboriginal rights in the Missisquoi territory were extinguished or never existed and that Vermont revolutionaries accepted this determination when they ratified his grants by the 1777 Constitution. That Governor Wentworth made a determination of extinguishment is not supported by the evidence and the revolutionaries "acceptance" of this asserted determination is speculation.

Secondly, the State argues that the Republic of Vermont's statutes addressing land settlement extinguish the Missisquoi's aboriginal title and rights. The State contends several of the statutes enacted by the legislature of the Republic of Vermont recognized the validity of land ownership based on the Wentworth grants and ensured full use and enjoyment of the lands. Furthermore, by statute, the legislature recognized only the legal title holder as a land owner and put the judicial and executive branch at the owner's disposal to maintain and defend those rights. Some statutes were intended to encourage settlement of the early towns. Taken together, these statutes indicate that the legislature did not recognize the existence of or the continued validity of aboriginal title in the land subject to the Wentworth grants or any grants made by the Republic of Vermont.

The State contends that the validity of claims based on the Wentworth grants and full use of the lands was ensured by several statutes. In support, the State cited a statute addressing the appointment and regulation of surveyors; a statute giving grant holders and other lawful entities the right to resort to courts to maintain, recover or protect their property interests; a statute preventing unlawful settlement of land and a statute setting a starting date for the settlement period upon which several grants were conditioned. Cited respectively; An Act for Appointing County Surveyors in the Counties; and for Directing and Regulating them in the Execution of their Office, 17 February 1779; 1779 Vt. Laws at 80, FF. 126(a); An Act for Enabling Communities to Maintain, Recover, and Defend their Common Rights, Estates and Interests 19 Feb 1779; 1779 Vt. Laws at 42, FF. 126(b); An Act to

Prevent Unlawful Settlement on Unappropriated Lands 16th March 1780; 1780 Vt. Laws at 190, FF. 126(d); An Act Declaring a Time When to Begin the Settlement of New Lands, that has been Prevented by the late war Between Great Britain and America, October 23 1783; 1783 Vt. Laws at 219, FF. 126(g).

The State asserts that the legislature recognized land claims only by the legal title holder and provided for resort to the executive and judicial branches of government for protection of ownership rights. The State cites the above mentioned statute preventing unlawful settlement of unappropriated land, two statues which grant authority to justices and sheriffs to inquire into and resolve complaints of forcible entry into and holding of lands by force and a statute which provides for the punishment of those who trespass on another's land and remove timber, crops or fruit or starts a fire which damages another's property. 1780 Vt. Laws at 190, FF. 126(d), An Act Directing Proceedings Against Forcible Entry and Detainer October 22d 1782; 1782 Vt. Laws at 140, FF. 126(e); An Act Directing Proceedings Against Forcible Entry and Detainer February 20th, 1787; 1787 Vt. Laws at 141, FF. 126(h); An Act for the Punishing of Trespasses in Divers Cases and Directing Proceedings therein. March 8th, 1787; 1787 Vt. Laws at 264, FF. 126(i).

Finally, the State asserts that statutes which encourages settlement also indicate the legislative intent to effect extinguishment. The State relies on the previously cited statues [sic] requiring legal title for settlement and setting a date for starting the prerequisite settlement periods. 1780 Vt. Laws at 190, FF. 126(d); 1783 Vt. Laws at 219, FF. 126(g). Additionally, the State cites a statute

which addresses the regulation of proprietor's meetings and one which permits proprietors to use undivided land to build mills as a means of encouraging settlement. An Act Regulating Proprietor's Meetings", 23 February 1779; 1779 Vt. Laws at 122, FF. 126(c); An Act in Addition to an Act Regulating Proprietors Meetings, October 23, 1783; 1783 Vt. Laws at 223, FF. 126(f).

Upon review of these statutes, the court is not persuaded that the statutes are acts which clearly and unambiguously imply the Republic's intent to extinguish the Missisquoi's aboriginal title. Because there is no demonstration that the Republic of Vermont did not adhere to the principles governing Native American relations followed by other nations, the court will consider the principles binding, including the principle that extinguishment is only accomplished where the sovereign clearly intended extinguishment. *Lipan*, 180 Ct. Cl. at 492-3; see also, *United States v. Dann*, 706 F.2d 919, 929 (9th Cir. 1983) (congressional homestead legislation did not meet requirement that Congress must make clear its intent to permit extinguishment as a result of any piece of legislation.) Here, the statues [sic] address issues which at best, only peripherally effect aboriginal title, if at all. The one statute which appears to effect aboriginal title, the statute requiring legal title to unappropriated land, upon closer examination, does not clearly imply the Republic's intent to extinguish aboriginal title or rights.

The statute requiring that after the passage of the statute in 1780, legal title to unappropriated land must be obtained before settlement or improvement does not clearly imply the Republic's intent to extinguish aboriginal title. An Act Preventing Unlawful Settlement on

Unappropriated Lands, 16 March 1780; 1780 Vt. Laws at 190, FF. 126(d). First, the statute does not specifically address Native Americans or aboriginal title. FF. 126(d).[22] More importantly, the legal title required by the statute is distinguishable from aboriginal title and is considered to be subject to aboriginal title.[23] Furthermore, the statute requires legal title prior to settlement or improvement of unappropriated land only after the passage of the act in 1780. The Missisquoi were present and had established aboriginal title long before 1780 and continued to be present in 1780. FF. 128. Therefore, this statute does not clearly and unambiguously imply the Republic's intent, as expressed by the legislature, to extinguish aboriginal rights or title.

The court also disagrees with the State's assertion that legislatively encouraged white settlement will achieve extinguishment consistent with the *Santa Fe* Court's statement that extinguishment can be achieved by the exercise of complete dominion adverse to the right of occupancy. *Santa Fe,* 314 U.S. at 347. In accordance with the previous discussion, where an intent to extinguish is sought to be implied from government acts permitting the use of land in a method adverse to the aboriginal title

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[22] The State contends that because the statutes do not expressly mention Native Americans or aboriginal title, they are not exempted from the operation of the statutes. This position however, is incorrect. As previously discussed, the continued existence of aboriginal title and rights is not dependent on authoritative recognition. *Infra* at 54. Instead, it is the extinguishment of aboriginal title and rights which requires authoritative recognition.

[23] *See* Ftnt 5, *Infra* at 46.

and rights, this court will require that such acts clearly and unambiguously imply an intent to extinguish aboriginal title and rights. *Infra* at **. The statues [sic] cited by the State asserted to encourage white settlement – legal title requirement for settlement, punishment for trespass and removing timber, crops and fruit and acts regulating proprietors meeting – are not comparable to the act found by the Court of Appeals for the 9th Circuit to imply extinguishment – forcible removal of the Native Americans over 100 years ago and subsequent consistent use of the land for recreation and conservation purposes. *Dann* 706 F.2d at 932-3; *Gemmill,* 535 F.2d at 1148-49. The statutes encouraging white settlement simply do not clearly and unambiguously imply the Republic's intent to extinguish aboriginal title in the Missisquoi territory.[24] Additionally, white settlement or acts preparing for such settlement do not in themselves affect aboriginal title. *Gila River Pima-Maricopa Indian Com. v. United States,* 494 F.2d 1386, 1391 (Ct. Cl. 1974).

Lastly, the State contends that the Republic of Vermont's perception of the Missisquoi as enemies of the Republic of Vermont operated to extinguish any aboriginal title the Missisquoi may have had. According to the

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[24] The State contends that white settlement can extinguish aboriginal title and rights. *Battise v. United States,* No. 3-83 (U.S. Cl. Ct. May 29, 1987) (LEXIS, 12 Cl. Ct. 426). The basic principles remain, however, that only the sovereign can extinguish aboriginal title and rights and there must be an act clearly and unambiguously implying the sovereigns' intent to extinguish aboriginal title and rights. *Infra* at 54-55. White settlement in the absence of such an act by the sovereign is insufficient to extinguish aboriginal title and rights.

State, a government has no obligation to protect its enemies' property rights and the Republic's concurrence with this proposition is demonstrated by its numerous statutes authorizing the confiscation of English Loyalist's property. Furthermore, the argument goes, the sending of the militia against the Missisquoi in 1786, as an act of force, effects extinguishment as it is strong indication that the sovereign intended extinguishment. *Montoya v. United States,* 180 U.S. 261, 267 (1901); *United States v. Gemmill,* 535 F.2d 1145, 1148 (9th Cir. 1976).[25]

Based on the evidence presented, the court cannot conclude that the Republic of Vermont considered the Missisquoi enemies. Late in 1775, the Continental Congress resolved that the St. Francis Missisquoi could be "called upon in a case of real necessity . . . ". FF. 122. Later, during the Revolutionary War, Generals Washington and Schuyler were concerned that the Missisquoi were hostile and might attack. Although most the Missisquoi were non partisan, of those that fought, more sided with the Americans. *Id.* Additionally, in a 1786 letter from Major Clement Gosselin to Ira Allen, the Major states that a number of the Missisquoi served the United States. The

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[25] The court does not consider this argument as the court previously ruled that the exhibit referring to the militia's alleged act is inadmissible. Additionally, the *Gemmill* court considered the military action as one of three acts which together accomplished extinguishment, albeit the military action, forcibly expelling the Native Americans, was considered the strongest factor supporting extinguishment. *United States v. Gemmill,* 535 F.2d 1145, 1148 (9th cir. 1976); *construed in United States v. Dann,* 706 F.2d 919, 932-33 (9th Cir. 1983) *rev'd on other grounds* 470 U.S. ___ (198 ___).

Major also states that the Missisquoi continued to claim their land and threatened to use force. FF. 123. Throughout the existence of the Republic of Vermont, the Missisquoi lived openly and unmolested in their Missisquoi homeland. FF. 128. The above evidence is insufficient to demonstrate that the revolutionaries and the Republic of Vermont perceived the Missisquoi as enemies during the Revolutionary War or afterwards. Therefore, the Missisquoi's aboriginal rights in the Missisquoi territory were not extinguished because their status as enemies of the Republic is unproven.

The State contends that the Missisquoi's failure to petition the Republic of Vermont's legislature to legitimize their ownership claims and their failure to resort to Vermont courts to resolve land claims disputes deprived them of any ownership status deserving of protection by the Republic of Vermont. In a similar vein, the State contends that laches deprives the Missisquoi of their aboriginal rights. The court does not agree. The basic premise remains that aboriginal title is valid until the sovereign engages in an act clearly and unambiguously implying the sovereign's intent to extinguish aboriginal title. The Missisquoi's failure to act does not meet this standard and such an act by the Republic of Vermont or the United States Congress is absent. *See, Oneida II*, 470 U.S. at 245 n. 16 (1985) (although only dicta, the Court rejected consideration of laches to extinguish aboriginal title as the required sovereign act was absent). Furthermore, resort to a colonial government to maintain or vindicate property rights was so foreign to the Missisquoi culture that it was not a viable option. FF. 130.

4. Extinguishment of Aboriginal Title by Vermont Constitution's Boatable Waters Provision.

Contrary to the State's contention, the Vermont Constitution's provision relating to fishing rights does not extinguish the Missisquoi's aboriginal rights to fish in the Missisquoi territory.[26] Assuming *arguendo* that Vermont was an independent Republic with sovereign status at the time of the 1777 Vermont Constitution, the court concludes that the boatable waters provision of the Constitution is not an act clearly and unambiguously implying the sovereign's intent to extinguish the Missisquoi's aboriginal title in their homeland.

The State asserts that the Missisquoi's aboriginal right to fish is dependent on federal statute, treaty recognition or the Missisquoi having aboriginal title to the land where the fishing occured [sic]. *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981). Because there is no treaty or statutory recognition of the Missisquoi's aboriginal right to fish, the Missisquoi aboriginal right to fish is dependent on their having aboriginal title to the land where the fishing occured [sic], the west side of the Missisquoi River. According to the State, any aboriginal rights the Missisquoi had in the Missisquoi River were extinguished by the 1777 Vermont Constitution's boatable water provision.

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[26] Vermont Constitution of 1777, Chapter II, section 39. In the current version of the Vermont Constitution, this section is designated a section 67. Hereinafter this section will be referred to as the "boatable waters provision".

The boatable water provision states:

> [t]he inhabitants of this State shall have liberty in seasonable times, to hunt and fowl in the lands they hold, and on other lands not inclosed [sic], and in like manner to fish all boatable waters and other waters (not private property) under proper regulations, to be made and provided by the General Assembly. Vt. Const. chapter II, section 39 (1977).

The State contends that as a matter of law the boatable water provision extinguishes any still existing Missisquoi aboriginal right to fish because the provision does not distinguish fishing rights on an ethnic basis. Furthermore, the provision has been interpreted to mean that title to the riverbed below boatable waters is held in trust for all residents and declares boatable waters to be subject to legislative regulation.[27]

The Missisquoi are not claiming fee title to the Missisquoi riverbed. They only claim that the right to fish in the Missisquoi River is a part of their aboriginal title and right to use and occupy their ancestral lands which include the Missisquoi River. *Infra* 52. Contrary to the State's position based on *Wahkiakum*, this court has already made clear its position that once having been

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[27] "Boatable waters" as used in the boatable waters provision are waters that are navigable in fact, such that in their ordinary condition they can be used for commerce, passage or transportation. *New England Trout & Salmon Club v.Mather*, 68 Vt. 338 (1895). Although whether a river is navigable is generally a question of fact for the jury, for the purposes of this motion, in the portion of the Missisquoi River where the fishing violations occured [sic], the river was only navigable to the extent that a birch bark canoe could float. *Id.* FF. 100.

established, the Missisquois' aboriginal rights are not contingent on authoritative recognition and will continue until extinguished by an act clearly and unambiguously implying the sovereign's intent to extinguish the Missisquoi aboriginal rights. *Infra* 54-55. Therefore, the question returns to whether the boatable waters provision is an act which clearly and unambiguously implies Vermont's intent to extinguish the Missisquoi's aboriginal right to fish in the Missisquoi River.

Assuming *arguendo,* that the Missisquoi River is a boatable water, the provision's failure to specifically reserve the Missisquoi's aboriginal right to fish separately from other ethnic groups' rights is not dispositive because authoritative recognition is not required for the continuation of aboriginal rights. *Infra* at 54. The preservation of the riverbed for the use of all does not affect the Missisquoi's aboriginal right to fish because the court concludes that exclusive use and occupancy is not required for the survival of aboriginal rights. *Infra* at 52. Additionally, the boatable water's provision permitting the General Assembly to *regulate* boatable waters is simply not an act clearly and unambiguously implying Vermont's intent to extinguish aboriginal fishing rights.

Furthermore, even if the Republic was a sovereign between 1777 and 1791, it did not exercise its power to extinguish aboriginal fishing rights in that 14 year period and subsequently lost the power to extinguish those rights when it joined the Union. It is a well accepted doctrine that a constitution is a grant of power from the people to the sovereign government. Here, by the boatable waters provision, the people of the Republic of Vermont granted the legislature the power to regulate fishing

rights. During the 14 years the Republic was allegedly a sovereign, the only legislation the Republic enacted to regulate fishing prohibited the construction of structures across waterways designed to block the passage of fish. An Act Regulating Fisheries, March 8th 1787; 1787 Vt. Laws at 253, FF. 126(j). There is no evidence of legislative enactments during that period that effect aboriginal fishing rights. Upon its entry into the Union in 1791, the Republic forfeited its power to extinguish aboriginal rights in accordance with the constitutional clause regulating commerce with Native Americans. *Post* at 92. Therefore, when the Republic had the power to extinguish aboriginal rights, it failed to exercise it by enacting legislation which clearly and unambiguously implied the Republic's intent to extinguish aboriginal rights, and after 1791, Vermont no longer had the power to extinguish aboriginal rights.

Accordingly, the court concludes that neither the boatable waters provision itself nor any statutes by the Republic pursuant to the provision qualify as an act clearly and unambiguously implying Vermont's intent to extinguish the Missisquoi's aboriginal fishing rights in the Missisquoi River.

The court has reviewed the State's remaining arguments supporting its proposition that the Missisquoi's aboriginal rights in the Missisquoi territory were extinguished before Vermont entered the Union in 1791 and concludes that none are sufficient to demonstrate by the preponderance of the evidence the extinguishment of the Missisquoi's aboriginal rights in the Missisquoi territory.

After Vermont's entrance into the Union in 1791 and its consequent relinquishment of the right to extinguish aboriginal title to the federal government, the federal government never extinguished the Missisquoi's aboriginal rights in the Missisquoi territory. The United States Constitution was ratified in 1788 and became operative in 1789. Vermont ratified the Constitution in January of 1791 and was admitted into the Union as the fourteenth state by an act of Congress in February of the same year. Vermont Statues [sic] Annotated, Historical Documents, United States Constitution, History at 27-8. "Since the adoption of the Constitution there has been broad agreement that the rights of extinguishment belongs to the national government." *Oneida III,* 860 F.2d at 1150 citing *Oneida I,* 414 U.S at 667. *See also Worcester v. State of Georgia,* 31 U.S. (Pet.) 6 (The United States Constitution confers upon Congress the power to regulate all relations with Indians); *Lipan,* 180 Ct.Cl. at 497 (pursuant to the Constitution, only Congress has the power to extinguish aboriginal rights). Therefore, as of 1791, only the federal government had the power to extinguish the Missisquoi's aboriginal rights. There has never been any cession, treaty or action by which the United States government intended to deprive the Missisquoi of their aboriginal rights in the Missisquoi territory. FF. 129.

The court concludes that the State has failed to prove by the preponderance of the evidence that the Missisquoi abandoned or ceded their Missisquoi homeland or that their aboriginal rights were extinguished by either an express act or an act clearly and unambiguously implying

any sovereign's intent to extinguish those rights. Accordingly, the Missisquoi's aboriginal right to fish in their Missisquoi homeland continues to exist today.

5. State Regulation of Aboriginal Rights.

The Missisquoi's aboriginal rights are federal rights, limiting the State's ability to regulate them. The State did not demonstrate that its licensing regulations are those of the permissible sort; those which regulate the manner of fishing, the take and commercial fishing. Nor did it meet its burden of demonstrating that the regulations are reasonable and necessary conservation measures and that conservation requires their application to the Missisquoi. Consequently, the State's statutes regulating the Missisquoi's aboriginal fishing rights are invalid, and the charges pursuant to those statutes must be dismissed.

As discussed above the Missisquoi derived their aboriginal title from their occupancy of the Missisquoi territory, and that title had not been extinguished when Vermont entered the Union. Pursuant to the federal Constitution, Vermont relinquished its powers to deal with the Native Americans as all matters relating to the Native Americans became the sole province of the federal government. *See generally, Oneida II,* 470 U.S. at 1251. Accordingly, aboriginal title is a federal right. *Id.* at 1252. By inference, aboriginal rights to fish inherent in aboriginal title must also be considered federal rights. The court concludes that, as with aboriginal title, it is of no consequence that the Missisquoi's aboriginal fishing rights are not recognized by treaty or statute because the rights need not derive from formal government action and do

not require sovereign recognition or affirmative acceptance for their continuation. *See, Oneida II* at 1252, *Lipan,* 180 Ct. Cl. at 492.

Aboriginal fishing rights, being federal rights reserved to the federal domain, the State may not qualify that right by charging license fees which are revenue producing. *See generally Tulee v. Washington,* 315 U.S. 668, 684-85 (1941). Permitting such licensing fees would effectively charge the Native Americans to exercise the rights which they have retained and are now under the protection of federal law. *See generally Tulee* at 684-85 (license fees charged for revenue purposes act as a charge upon the Native Americans for the aboriginal rights to fish their ancestors intended to reserve by treaty).

The United States Supreme Court, however, has held that even though an aboriginal right to fish may not be qualified by a State, "the manner of fishing [and hunting], the size of the take, and the restriction of commercial fishing [and hunting], and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Antoine v. Washington,* 420 U.S. 194, 207 (1974) citing *Puyallup Tribe v. Department of Game of Washington, et al.,* 391 U.S. 392 at 398 (1967). Under the "appropriate standards" requirement, the "State must demonstrate that its regulation is a reasonable and necessary conservation measure (citations omitted) *and* that its application to the Indians is necessary in the interests of conservation." *Antoine* at 207.

The State offered no evidence that 10 V.S.A. sec. 4251, the statute requiring a license to fish is not a revenue

producing tool and that it is a reasonable and necessary conservation measure whose application to the Missisquoi is necessary in the interests of conservation. Accordingly, the court concludes that the State has not met its burden of proof that the licensing regulation is a reasonable and necessary conservation method and its application to the Missisquoi is necessary for conservation. Having failed to demonstrate the validity of the licensing regulation as to the Missisquoi, the State's charges of the violation of the statutes implementing the regulations must be dismissed.

ORDER

The Court dismisses with prejudice the fish-in charges against all defendants except Sylvia Wells, Tammy Lee Conger, Richard Rowe, Mark Rushlow, Raleigh Elliot and Joy Mashtare, who have failed to demonstrate that they are members of the Missisquoi Abenaki tribe with Missisquoi Abenaki Ancestry traceable to a time prior to first European contact.

The Court denies the various motions to dismiss for lack of jurisdiction; the Missisquoi homeland is not now Indian country.

The Court directs the clerk to set all cases not dismissed for status conference before the presiding judge.

Dated at St. Johnsbury, Vermont this 11th day of August, 1989.

/s/ Joseph J. Wolchik
Joseph J. Wolchik
Vermont District Judge

STATE OF VERMONT
FRANKLIN COUNTY, SS.

(Filed Jan. 20, 1989)

District Court of Vermont
Unit #2, Franklin Circuit

State of Vermont	Docket No. 1171-10 86Fcr 1327-11 86Fcr
v.	15-1-87Fcr 379-4-87Fcr
Harold St. Francis	
State of Vermont	Docket No. 703-5-88Fcr 752-6-87Fcr
v.	771-6-87Fcr 1023-8-87Fcr
John Churchill	1045-8-87Fcr
State of Vermont	Docket No. 937-7-88Fcr
v.	
Homer St. Francis	
State of Vermont	Docket No. (Fishing without Licence)
v.	
Homer St. Francis	

NOTICE OF DECISION

The above matters are before this court on the issues of the burden of proof and burden of going forward as effected by the Vermont Supreme Court's recent rulings in *State v. Homer St. Francis*, Docket No. 85-550, (December 2, 1988). After reviewing the parties arguments, this court concludes that its initial determination is correct on the issue of which party has the burden of proof and

burden of moving forward regarding aboriginal title and and indian country.

It is not disputed that defendants' claims of aboriginal rights and indian country are separate and distinct, although some overlap exists. *State v. Homer St. Francis* addressed only the issue of indian country, not aboriginal rights. The *St. Francis* Court's ruling was limited to who had the burden of proof as to whether defendants were indians and whether the alleged offenses occured [sic] in indian country. *Id.* at 5. Consistent with the *St. Francis* decision, this court held that the defendants have the burden of proving that the alleged crimes occured [sic] in indian country. Where defendants are claiming the existence of indian country as the result of a dependent indian community, the Court provided guidance regarding the appropriate standards for determining the existence of a dependent indian community. *Id.* at 3.

Although both parties assert that the *St. Francis* Court's analysis of allocating the burden of proof and burden to move forward supports their respective positions on the issue of extinguishment of aboriginal title, this court concludes that its prior ruling on the burden of proof is in accordance with the *St. Francis* decision.

Defendants, as "the party having in form the affirmative allegation", have the burden to prove the initial existence of aboriginal title. *Id.* at 5.

If defendants have the burden of proof on the extinguishment issue, they will be required to prove that extinguishment did not occur.

Proving that an act did not occur is proof of a negative fact, precisely what the *St. Francis* court sought to avoid. *St. Francis* at 5.

Dated at St. Johnsbury , Vermont, this 19th day of January, 1989.

/s/ Joseph J. Wolchik
Joseph J. Wolchik

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STATE OF VERMONT
FRANKLIN COUNTY, SS.

(Filed Dec. 22, 1988)

District Court of Vermont
Unit #2, Franklin Circuit

State of Vermont — Docket No. 1171-10 86Fcr
1327-11-86Fcr
v. — 15-1-87Fcr
379-4-87Fcr
Harold St. Francis

State of Vermont — Docket No. 703-5-88Fcr
752-6-87Fcr
v. — 771-6-87Fcr
1023-8-87Fcr
John Churchill — 1045-8-87Fcr

State of Vermont — Docket No. 937-7-88Fcr
v.
Homer St. Francis

State of Vermont — Docket No. (Fishing without Licence)
v.
Homer St. Francis

ORDER

The above matters are before this court on several motions by the Defendants and the State. The Defendants' motions are as follows: Renewed Motion to Establish Burden of Proof; Motion for Return of Materials; Motion to Quash Subpoena and and Notice to Take Oral Deposition Duces Tecum; Motion for Sanctions; Supplemental Motion for Sanctions; Motion for Enlargement of

Time for Filing List of Exhibits; and Motion for a Continuance. The State's motions consist of a Motion to Compel Production of Dr. Collin Calloway's *The Conquest of Indian Vermont: The Dispersal and Survival of the Western Abanaki* and a Motion to Compel testimony by John Moody. On December 5, 1988 a conference call was held to address these motions. Andrew M. Eschen, Assistant Attorney General and Howard Van Benthusen, Franklin County State's Attorney represented the State. Gabor Rona, Esq.; Neil Mickenberg, Esq; Steve Dunham, Esq; and Tod Taylor, Esq represented the Defendants.

On Defendant's Renewed Motion to Establish the Burden of Proof, this court orders that the State has the initial burden of proof. The State must establish that the Defendants allegedly committed the charged crimes within Franklin County. The burden then shifts to the Defendants, as representative of the Native Americans, to prove the indian issues which would negate the State's jurisdiction; aboriginal rights and "indian country" claims. If the Defendant's meet this burden, then the burden shifts back to the State. On rebuttal, the State must go forward and demonstrate the extinguishment of aboriginal rights and other evidence of jurisdiction. A preponderance of the evidence is the applicable standard of proof. Additionally, the parties will attempt to stipulate for the record the offenses charged and the location of the offenses as discussed during the conference.

Defendants moved that this court order the State to return to Defendants all copies of "Appendices for the Addendum to the Petition for Federal Recognition as an American Indian Tribe Submitted to the Bureau of Indian Affairs by the Abanaki Nation of Vermont", asserting that

information contained therein is protected by the Privacy Act and the Bureau of Indian Affairs's (BIA) assurances of confidentiality. This court orders that the State submit to this court all documents it received from the BIA, including but not limited to the Petition, the Appendix to the Petition, articles filed in connection with the Petition, Self Help Corporations' Meeting Minutes and other statements. The State is to submit all reproductions of the documents or any part thereof, whether hand written or mechanically produced. These documents are to be put under seal and sent to the Vermont District Court, in St. Albans, Vermont.

Both the Defendants and the State will submit memoranda addressing the effect of the Privacy Act and 5 USC Sec. 552(a)(7) on the availability of the above documents to the State. The parties should also address the State's use of the above material in its cross-examinations.

Defendant's Motion to quash the Subpoena and Notice to take Oral Deposition Deuces Tecum is granted on the basis of V.R.Cr.P. 17(c)'s prohibition of directing subpoenas to an individual defendant.

Next is Defendant's Motion for Sanctions for Violations of Discovery Orders and Rules. Defendant asserts that the State's failure to provide a copy of a report by a state expert, Dr. Francis Hutchins, violates V.R.Cr.P. 16(a)(2)(C)'s requirement of disclosure of expert's reports made in connection with the case. The State argues that because Dr. Hutchins is an agent of the prosecution, Dr. Hutchins' report is privileged as work product under

V.R.Cr.P 16(d) and also under V.R.Cr.P. 16.1(b) as containing mental impressions and conclusions in connection with legal advice. Because the State intends to use Dr. Hutchins as an expert and there appear to be very real concerns about the report containing work product, the State will submit Dr. Hutchins' report for in camera inspection by this court. The State will also submit a memorandum identifying the portions of the report it considers work product and why it is work product. Please submit the report accompanied by the memorandum to the undersigned at the Vermont District Court in St. Johnsbury, Vermont.

Furthermore, in connection with this motion and Defendant's Motion for Enlargement of Time, this court orders the State to provide Defendants' counsel with a list of the former Vermont Statutes to which Dr. Hutchins may refer at trial. The State must provide this information to Defendant's counsel by noon on Thursday, December 9, 1988.

The Defendants also assert in this motion that the State is in possession of numerous materials which should have been disclosed to Defendants under V.R.Cr.P. 16(a)(2). In accordance with the conference discussion, the State will permit the Defendants' counsel to copy the newspaper clippings collected by the State pertaining to the case and the Tribal Resolutions of Canada. If the State has a clean copy of the transcript of John Churchill's testimony regarding Homer St. Francis, it will make it available to Defendant's counsel. Otherwise, the Defendants may pay for a transcript to be produced.

In connection with the above Motion, this court considered Defendants' Supplemental Motion for Sanctions. Defendants' counsel asserted that the State acted with bad faith in its delay in making witnesses available and failure to provide exculpatory material. Defendants' Motions for sanctions are denied at this time as there was no finding of need, however, the court will reconsider the motions if sufficient evidence is produced.

Defendants' Motion for an Extension of Time to file Exhibits is granted. Defendants' counsel represented that their choice of exhibits will depend in large part on the information revealed by Dr. Hutchins' deposition. Accordingly, Defendants are ordered to file their list of exhibits within five business days of their deposing Dr. Hutchins.

Defendants' Motion for a Continuance is granted. It is apparent from the amount of material that must still be produced under discovery, witnesses still to be deposed and the subsequent time needed to review the material and prepare accordingly, it would be unjust to require the parties to go forward with the evidentiary hearing scheduled for December 12, 1988. Consequently, this matter will be continued until further notice.

The State's Motion to Compel Production of Dr. Collin Calloway's book entitled *The Conquest of Indian Vermont: The Dispersal and Survival of the Western Abanaki* is denied. The State asserts that because Dr. Calloway is an expert witness of Defendant's, his book is discoverable under V.R.Cr.P. 16.1(b). However, because the Defendants do not intend to use any portion of the book at a hearing

or trial, a pre-requisite to the operation of the Rule is absent and the book is not discoverable.

The State's motion to compel the testimony of John Moody is granted as to the Defendants named in the case. This court orders that Mr. Rona and Mr. Mickenberg will work with Mr. Moody toward his producing the genealogy of the named Defendants no later than seventy two hours before the rescheduled deposition. If the deposition is not continued, then the Defendant's genealogy will be provided to the State by December 12, 1988.

SUMMARY

The Defendants' Renewed Motion to Establish Burden of Proof is *Denied* in accordance with the above.

The Defendants' Motion for Return of Materials is *Granted* to the extent outlined above.

The Defendants' Motion to Quash Subpoena and Notice to Take Oral Deposition Duces Tecum is *Granted*.

The Defendants' Motion for Sanctions and Supplemental Motion for Sanctions are *Denied* at this time.

The Defendants' Motion for Enlargement of Time for Filing List of Exhibits is *Granted* pursuant to the condition stated above.

The Defendants' Motion for a Continuance is *Granted*.

The State's Motion to Compel Production of Dr. Collin Calloway's *The Conquest of Indian Vermont: The Dispersal and Survival of the Western Abanaki* is *Denied*.

That State's Motion to Compel testimony by John Moody is *Granted* in accordance with the above conditions.

Dated on this 21st day of December, 1988 at St. Johnsbury, Vermont.

/s/ Joseph J. Wolchik
District Court Judge

AMENDED ENTRY ORDER

[VERMONT] SUPREME COURT
DOCKET NOS. 89-483 and 89-516

JUNE TERM, 1990

(Filed SEP 24, 1990)

State of Vermont	)	APPEALED FROM:
v.	)	District Court of Vermont, Unit No. 2, Franklin Circuit
Homer St. Francis, et al.	)	DOCKET NOS. 937-7-88Fcr 14463 F&G and others

In the above entitled cause the Clerk will enter:

By motion filed August 6, 1990 the State has moved for clarification of our entry order dated July 27, 1990, pointing out some confusion in that order's description of the procedural history of this matter. A memorandum in support of that motion was filed on August 14, 1990, by the attorney for the so-called "fish-in" defendants. Although the requested clarification does not change the outcome of the motions disposed of by that order, we hereby amend that order and substitute the present order to avoid any future confusion.

These interlocutory appeals arise from one felony and numerous misdemeanor prosecutions in Franklin County, the majority of which involved misdemeanor charges of fishing without a license or failing to show a license to a warden (the so-called "fish-in" cases).

On May 2, 1988, in the "fish-in" cases, defendants filed a motion to dismiss, alleging that the trial court lacked jurisdiction for three reasons: (1) that exclusive criminal jurisdiction rests with the federal courts because the land on which the offenses took place is "Indian country" within the meaning of 18 U.S.C. §§ 1151-1152; (2) that defendants enjoy an aboriginal right to subsistence fishing by virtue of their individual status as members of the Abenaki Indian tribe; and (3) that the State's attempt to control, license or regulate Abenaki fishing on Abenaki ancestral lands violates 25 U.S.C. § 1321(b).

In the other criminal cases, defendants filed individual motions to dismiss, filed or renewed in June 1988, arguing that the offenses charged involved Indians in "Indian country" as defined in federal law over which the State does not have subject-matter jurisdiction. As to the charge of driving while license suspended, defendants argued that an unextinguished aboriginal right to travel exists which cannot be regulated by the State.

The motions to dismiss were consolidated for hearing, and on August 14, 1989, the trial court filed its 96-page decision and order. The trial court dismissed with prejudice the "fish-in" charges against all but six defendants, recognizing their claim to unextinguished aboriginal fishing rights. The court denied both the "fish-in" and other defendants' motions to dismiss for lack of jurisdiction, holding that the Missisquoi homeland is not now "Indian country."

The "fish-in" defendants moved on August 23, 1989, to amend the order, arguing that the six "fish-in" defendants whose cases were not dismissed should also be

considered to enjoy aboriginal rights because the Missisquoi/Abenaki Nation had enrolled them as members and the tribe should be the sole determinant of its membership. That motion was denied on September 20, 1989, and that denial was not appealed.

On August 21, 1989, the other defendants moved for permission to bring an interlocutory appeal, stating the following as controlling questions of law: (A) Are St. Albans, Swanton and Highgate part of a dependent Indian community?; (B) Do the aboriginal rights of the Missisquoi Abenaki include the right to travel within their territory (as found by the court at page 50) without regulation by the State?; (c) Whether the court erred in failing to make supplemental proposed findings 2 through 12 and in making findings 151 through 153?; and (D) Whether the burden of proof on the issue of dependent Indian community was erroneously assigned to the defense rather than requiring the State to establish the absence of a dependent Indian community beyond a reasonable doubt? The trial court granted permission to bring the interlocutory appeal on September 21, 1989. That matter and a portion of the file was forwarded to this Court and received the docket number 89-483.

On August 18, 1989, the State filed a notice of appeal of the dismissals of the "fish-in" cases and at the same time moved to strike and withdraw the entry of final judgment on the dismissal so that it could request permission to appeal under 13 V.S.A. § 7403, which allows the trial court in a misdemeanor case to pass questions of law to this Court "before final judgment." The trial court concluded, in an order filed September 20, 1989, that § 7403 did not allow the relief requested, but urged that

"other avenues to a supreme court review be followed, if available," because "the issues presented are likely to appear in some form in the future, at great expense to all parties." On September 25, 1989, the State filed a motion to reconsider, and, in the alternative, a "notice of appeal" designated in its text as "from the court's adverse rulings in regard to the instant motion and its order entered on September 20, 1989." By opinion filed October 12, 1989 the trial court denied the State's motion to reconsider, concluding that § 7403 would not allow the State's appeal of a misdemeanor dismissal even if the judgment had been deemed to have been rendered when docket entries were written up for the case on September 25-27, 1989, rather than when it was filed on August 14, 1989. The trial court also denied the State's motion for permission to appeal, and directed that the Clerk "handle the Notice of Appeal in the normal fashion." The trial court clerk forwarded here the State's Notice of Appeal and an additional portion of the trial court file, which was docketed as a separate case and received this Court's docket number 89-516.

Defendants moved in this Court to dismiss the State's appeal because 13 V.S.A. § 7403 does not allow State appeal in misdemeanor cases unless the trial court has placed questions of law on the record for interlocutory appeal before final judgment. Defendants also argue that the State failed to move in this Court for interlocutory appeal after the trial court denied permission to appeal. In addition, defendants have moved that Justice Dooley be recused from participating in this appeal.

We first, on our own motion, consolidate these two cases under Docket No. 89-483, and direct that the

Supreme Court Clerk reassemble the record, as these are appeals from a single trial court order.

Second, we note that Justice Dooley has disqualified himself from participating in this proceeding. V.R.A.P. 31(e)(2).

Third, we treat the State's notice of appeal, filed in the alternative on September 25, 1989, as a motion addressed to this Court for permission to take an interlocutory appeal from the dismissal order, and deny that motion. The State has failed to demonstrate that the trial court abused its discretion in denying permission to appeal. *State v. McCann*, 149 Vt. 147, 151, 541 A.2d 75, 77 (1987). However, to the extent that the trial court's August 14, 1989 opinion and order may present interlocutory issues relevant to the six "fish-in" defendants whose cases were not dismissed, the State may seek in the trial court appropriate permission to appeal pursuant to V.R.Cr.P. 45(b), 13 V.S.A. § 7403, and V.R.A.P. 5, if it be so advised.

Our ruling leaves the six "fish-in" cases which were not dismissed by the trial court's August 14, 1989, order still pending in the trial court. The other criminal cases remain pending on an interlocutory appeal in this Court.

Our records show that the transcript in No. 89-483 was ordered on December 4, 1989, and that as of March 14, 1990 the trial court clerk had informed this Court that additional transcripts were due. We requested appellants to inform this Court in writing what transcripts remain to be completed and their expected dates of completion. Attorney Dunham has reported that the only transcripts remaining to be completed are of a December 5, 1988

status conference and a November 15, 1988 hearing reflected on the records of the trial court. By a copy of this order we hereby request the clerk of the trial court to advise whether these transcripts are being prepared, and we note that after October 15, 1990, it will be the responsibility of the court reporter to advise the litigants and this Court when each transcript is completed.

BY THE COURT:

/s/ Frederic W. Allen
Frederic W. Allen,
Chief Justice

/s/ Louis P. Peck
Louis P. Peck,
Associate Justice

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

/s/ James L. Morse
James L. Morse,
Associate Justice

Publish

[✓] Do Not Publish

Form Number 368
Motion Reaction Form Hold for memo until: ___

STATE OF VERMONT
[ ] DISTRICT COURT OF VERMONT
[ ] SUPERIOR COURT OF VERMONT

Unit No. 2

Circuit/County Franklin

Docket Number Fish & Game Tickets±
014459/064482/014490/014485

State of Vemront [sic] V Elliot, Rushlow, Lowe and Wells

ENTRY REGARDING MOTION

Title of Motion: Motion for Permission to Appeal

Date Motion Filed: 9/13/90

Party Filing
Motion: ~~[ ] Plaintiff~~/State Susan Harritt, Esq.

[ ] Defendant _____

[ ] Other _____

Date Response Filed: 9/27/90
("NONE" If None Filed)

Compliance by _____

✓ Granted

_ Denied

_ Scheduled for hearing on: _____ (Date) at _____ (Time);

Time Allotted _____

✓ Other Appeal at this point will, perhaps, avoid protracted relitigation of the aboriginal rights

issue & bring a conclusion to the case on an issue where reasonable people can differ.

/s/ Illegible
Presiding Judge

_____

Assistant Judge

_____

Assistant Judge

10/24/90
Date

Date copies sent to: 11/2/90

Plaintiff/State _____

Defense _____

Other Susan R. Harritt, Esq.
Steve Dunham, Esq.
Neil Mickenberg, Esq. Clerk's Initials Illegible
Howard VanBenthuysen, Esq.
Gabor Rona, Esq.

_____

ENTRY ORDER

[VERMONT] SUPREME COURT
DOCKET NO. 90-512

OCTOBER TERM, 1991

State of Vermont	)	APPEALED FROM:
	)	
v.	)	District Court of Vermont
	)	Unit No. 2, Franklin Circuit
	)	
Raleigh Elliott, et al.	)	DOCKET NO. 14459, et al.

(Filed Aug. 25, 1992)

In the above entitled cause the Clerk will enter:

Appellees' motion for reargument, filed June 25, 1992, fails to identify points of law or fact misapprehended or overlooked by this Court. The motion is therefore denied.

BY THE COURT:

/s/ Frederic W. Allen
Frederic W. Allen,
Chief Justice

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

[ ] Publish

[ ] Do Not Publish

/s/ James L. Morse
James L. Morse,
Associate Justice

/s/ Albert W. Barney
Albert W. Barney,
Chief Justice (Ret.),
Specially Assigned

/s/ Louis P. Peck
Louis P. Peck,
Associate Justice (Ret.),
Specially Assigned

CHAP. XII. – *An Act giving effect to the laws of the United States within the state of Vermont.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the third day of March next, all the laws of the United States, which are not locally inapplicable, ought to have, and shall have, the same force and effect within the state of Vermont, as elsewhere within the United States.

And to the end that the act, intituled "An act to establish the judicial courts of the United States," may be duly administered within the said state of Vermont,

SEC. 2. *Be it further enacted,* That the said state shall be one district, to be denominated Vermont District; and there shall be a district court therein, to consist of one judge, who shall reside within the said district, and be called a district judge, and shall hold annually four sessions; the first to commence on the first Monday in May next, and the three other sessions progressively on the like Monday of every third calendar month afterwards. The said district court shall be held alternately at the towns of Rutland and Windsor, beginning at the first.

SEC. 3. *And be it further enacted,* That the said district shall be, and the same hereby is annexed to the eastern circuit. And there shall be held annually in the said district one circuit court; the first session shall commence on the seventeenth day of June next, and the subsequent sessions on the like day of June afterwards, except when any of the said days shall happen on a Sunday, and then the session shall commence on the day following; and the

said sessions of the said circuit courts shall be held at the town of Bennington.

SEC. 4. *And be it further enacted,* That there shall be allowed to the judge of the said district court the yearly compensation of eight hundred dollars, to commence from the time of his appointment, and to be paid quarter yearly at the treasury of the United States.

SEC. 5. *And be it further enacted,* That all the regulations, provisions, directions, authorities, penalties, and other matters whatsoever, (except as herein afterwards is expressly provided) contained and expressed in and by the act, intituled "An act providing for the enumeration of the inhabitants of the United States," shall have the same force and effect within the said state of Vermont, as if the same were, in relation thereto, repeated and re-enacted in and by this present act.

SEC. 6. *And be it further enacted,* That the enumeration of the inhabitants of the said state shall commence on the first Monday of April next, and shall close within five calendar months thereafter.

SEC. 7. *And be it further enacted,* That the marshal of the district of Vermont shall receive in full compensation for all the duties and services confided to, and enjoined upon him in and by this act in taking the enumeration aforesaid, two hundred dollars.

And that the act intituled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships and vessels," may be carried into effect in the said state of Vermont:

SEC. 8. *Be it further enacted,* That for the due collection of the said duties, there shall be in the said state of Vermont one district; and a collector shall be appointed, to reside at Allburgh on Lake Champlain, which shall be the only port of entry or delivery within the said district, of any goods, wares or merchandise, not the growth or manufacture of the United States.

Provided nevertheless, That the exception contained in the sixty-ninth section of the act last above mentioned, relative to the district of Louisville, shall be and is hereby extended to the said port of Allburgh.

APPROVED, March 2, 1791.

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

No. 92-877

In The

Supreme Court of the United States

October Term, 1992

RALEIGH ELLIOTT, MARK ROCHELEAU, RICHARD ROWE and SYLVIA WELLS,

Petitioners,

vs.

STATE OF VERMONT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

RESPONDENT'S BRIEF IN OPPOSITION

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: SUSAN R. HARRITT
Counsel of Record
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

Attorney for Respondent

WILLIAM GRIFFIN
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 92-877

In The

Supreme Court of the United States

October Term, 1992

RALEIGH ELLIOTT, MARK ROCHELEAU, RICHARD ROWE and SYLVIA WELLS,

Petitioners,

vs.

STATE OF VERMONT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY

The Petition for a Writ of Certiorari seeks an untimely review of a unanimous decision of the Supreme Court of Vermont. On an appeal from a decision dismissing the underlying charges, the Court decided that the petitioners were subject to prosecution for fishing without a license, rejecting their claim that the Missisquoi

Abenaki[1] hold aboriginal title to the fishing area. Following the Court's order of reversal and remand, Pet. App. A 28, the petitioners now await trial.

The Vermont Supreme Court applied the principles established by this Court in aboriginal rights cases from *Johnson v. McIntosh*, 21 Wheat. 543 (1823) to *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985). It concluded, based on record evidence, that any aboriginal title to the site of the charges was extinguished by the actions and events that culminated in Vermont's admission to the Union in 1791. As the Court indicated: "Short of an express statement declaring an intent to extinguish, it is difficult to imagine a demonstration of intent that could be more unequivocal than these cumulative events leading to statehood." Pet. App. A 28.

STATEMENT OF THE CASE

The Vermont Supreme Court traced the historical events that determined sovereignty and ownership of the lands in question. The facts are not subject to serious dispute. The Supreme Court accepted most of the trial court's findings, which in turn were based on petitioners' evidence. The Supreme Court differed with the trial court "principally in its application of the test for extinguishment to discrete events in Vermont's history, rather than

[1] The Vermont Supreme Court did not decide whether the Missisquoi Abenaki are a bona fide tribe of Native Americans, Pet. App. A 11. They are not a tribe recognized by the Bureau of Indian Affairs.

to the cumulative effect of many historical events." Pet. App. A 20.

The Court began its analysis by examining the land grants made by Benning Wentworth, the Royal Governor of New Hampshire, in August, 1763.[2] *Id.* at A 13; *see also* B 30, ¶115. Governor Wentworth's grants encompassed the Towns of Swanton (the site of the fishing charges), St. Albans and Highgate. *Id.* The grants were intended to be possessory, and expressly required that the lands be settled and improved. *Id.* at A 13 n.4, A 26.

The settlement of these and other grants made by Governor Wentworth began in the 1760's. In 1766, at a meeting at Isle LaMotte[3] attended by British officials and Native Americans, "the Missiquoi [Abenaki] complained of settlers on their land". *Id.* at B 10-11, ¶¶37-38. The next year, in 1767, a Wentworth grantee petitioned the King "on behalf of himself and more than one thousand other Grantees" who claimed they had "expended large sums of money in settling and cultivating" their Vermont grants. Resp. App. A 2. *See also* Pet. App. B 12, ¶41 (the Missisquoi lost control of choice farmland in the period 1775-1785); B 12, ¶43 (in 1783 the Missisquoi withdrew from central areas and went "underground" in response to "the influx of Europeans"); B 13, ¶51 ("by 1791 the

---

[2] The grants are variously referred to as the Wentworth grants or the New Hampshire grants.

[3] Isle LaMotte is a town in northwestern Vermont about ten miles from Swanton.

Missisquoi were dispossessed of the choicest part of their homelands").[4]

The lands covered by the Wentworth grants were also claimed and granted by the Royal Governors of New York. *Id.* at A 14-15; B 31, ¶121. In 1764 the Crown resolved the jurisdictional issue by ruling that the Connecticut River was the boundary between the two colonies, putting the Wentworth grants under the jurisdiction of New York. *Id.* at A 15; B 30, ¶116. In 1767, however, the Crown answered the petition brought by the Wentworth grantees and prohibited the New York Governor from making any grants of their lands. *Id.* at A 15; Resp. App. A 1-3.

The dispute between the Vermont settlers and the New York government continued until January, 1777, when the Vermonters declared their independence and proclaimed a Republic. Vermont's 1777 constitution asserted the Republic's jurisdiction over the lands granted by Governor Wentworth and contained an "explicit ratification of the Wentworth grants." Pet. App. B 78-79.

By 1781 Vermont was actively seeking admission to the Union, and in the process Congress inquired about the settlement and ownership of the Wentworth grants.

---

[4] The trial court finding that settlement did not begin until 1783, Pet. App. B 30, ¶115, is both internally inconsistent and unsupported by evidence. The trial court cited p. 132 of the testimony of historian Gordon Day ("D at 132"). The initial transcript of his testimony indicated that settlement "began around 1670". Resp. App. at B 1. This was later corrected to "1760". *Id.*

Vermont's representatives said that they would adopt procedures for resolving conflicting claims resulting from the New York and New Hampshire grants, and that they would allow "a further reasonable time" for settlement so that forfeitures of unsettled lands would be avoided. *Id.* at A 17-18 n.8. Congress did not challenge this proposal, but resolved that the Vermonters would have to relinquish their claims to "lands or jurisdiction on the east side of the west bank of the Connecticut River" (that is, their claims to lands in present day New Hampshire). *Id.* at A 18-19. In order "to confirm their entitlement" and to fulfill their commitment to Congress the Vermonters proceeded to enact legislation that extended the time for settling the grants. *Id.*

Vermont's admission to the Union was then delayed pending a resolution of New York's claims to the area. New York's consent to Vermont statehood was obtained in 1790 when Vermont paid New York $30,000 " 'for relinquishment of all claims of sovereignty by New York, and for the confirmation of the New Hampshire township grants.' " *Id.* at A 19 (quoting from *Vermont v. New Hampshire*, 289 U.S. 593, 611 (1933)). Vermont was admitted to the Union on these terms in 1791. *Id.*

In summary, the record shows and the Supreme Court of Vermont concluded that:

> The Crown's sanctioning of European dominion over the area, the zeal with which the founders of the "Republic" of Vermont protected the New Hampshire Grants, and the negotiations with Congress in anticipation of Vermont joining the Union remove any doubt that extinguishment of

> Abenaki aboriginal title was complete by 1791, when Vermont became the fourteenth state.

Id. A 20-21.

REASONS FOR DENYING PETITION

Certiorari should be denied because, contrary to petitioners' assertions:

1. The cause is not yet final.

2. The Vermont Supreme Court gave full effect to the precedents of this Court that govern the extinguishment of aboriginal title.

3. The decision of the Vermont Supreme Court was based entirely on record evidence and facts established at trial.

I. In the absence of appellate review of a final judgment, the cause is not ripe for determination.

Petitioners seek a writ of certiorari from a decision by the state's highest court that reverses and remands the cause for trial. If petitioners are convicted, a second appeal, even one that is a formality, is still a prerequisite to Supreme Court review in accordance with the requirements of 28 U.S.C. § 1257. *McComb v. Commissioners,* 91 U.S. 1 (1875); *Great Western Tel. Co. v. Burnham,* 162 U.S. 339 (1896).

Petitioners argue that the exceptions to the finality rule, as discussed in *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975), apply here and permit this Court to

review these claims. Under *Cox* petitioners must raise a federal issue which, if left unresolved, would "seriosly erode federal policy". *Id.* at 483. Petitioners argue that they have met that requirement because the Vermont Supreme Court articulated a new federal policy for extinguishment of aboriginal rights. In fact, as discussed below, the state high court applied the same standards and mode of analysis used in the past by this Court. There are no novel federal policy issues at stake. Unlike the First Amendment issues implicated in *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 55 (1989), this cause does not impact on federal policy. The decision of the Vermont Supreme Court does not carve out or create new law in the area of Indian rights. Moreover, the Court scrupulously applied the proper federal law.

As to the other claimed exception, petitioners assert that "the federal issues will survive and require a decision." Pet. at 5. In the *Cox* case this Court described this exception as one of "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue *cannot be had,* whatever the ultimate outcome of the case." *Cox Broadcasting Corporation v. Cohn, supra,* at 481 (emphasis added). Here, if the petitioning parties lose in the criminal court, they may appeal their convictions at the state high court and then petition this Court.

In sum, the respondent urges the Court to literally interpret the exception language it enunciated in *Cox*. The outcome of further proceedings is not "preordained". *Cox Broadcasting Corporation v. Cohn, supra,* at 479. Petitioners do not satisfy the requirements of 28 U.S.C. § 1257.

II. The Vermont Supreme Court Gave Full Effect To The Precedents Of This Court That Govern The Extinguishment Of Aboriginal Title.

Petitioners argue and respondent agrees that "[t]he rules governing aboriginal title and its extinguishment have been well established in a long line of cases starting with the 1823 decision in *Johnson v. McIntosh*, 21 Wheat. 543 (1823) and culminating in the 1985 decision in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985)." Pet. at 15.

The Vermont Supreme Court acknowledged and applied these same precedents. The Court began its legal analysis by observing that:

> Sovereign intent to extinguish need not be express, but there must be evidence that demonstrates a "plain and unambiguous" intent to extinguish exclusive aboriginal rights. *Oneida II*, 470 U.S. at 248. Because of the federal policy to respect Indian rights of occupancy, the intent to extinguish Indian Title will not be " 'lightly implied.' " *Id.* at 247-48 (quoting *Santa Fe*, 314 U.S. at 346).
>
> * * *
>
> The essential test requiring sovereign consent to extinguish aboriginal rights has remained intact since its adoption in *Johnson*.

Pet. App. A 9-10.

Petitioners complain that the Court considered "the increasing weight of history" when it reviewed the historical events that extinguished aboriginal title. This is true, but is not heresy. The Court simply recognized that

events must be considered in their "historical setting". *See United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 358 (1941) ("In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved.")

Petitioners argue that the British sovereign intended to protect and not extinguish aboriginal title. The "Royal Instruction" of 1761 and the "Royal Proclamation" of 1763 did indicate a general intent that colonial governors should preserve aboriginal rights. However, as the Vermont Supreme Court noted, the Crown's later and specific Orders respecting the Wentworth grants preserved the status quo of European settlement. "The necessary and inevitable outcome of the Crown's position [in 1764 and 1767] would still be that Europeans would appropriate the area . . . These events are evidence of increasing European dominion adverse to the use and occupation of the Indians, to which the Crown impliedly consented." Pet. App. A 22; *see also id.* at A 15; Resp. App. A 1-2.

Petitioners claim that the Abenaki lived openly and peacefully on the Wentworth grants from 1763 until 1791, and argue that this somehow rendered the grants void. Legal theory aside, this claim is flatly contradicted by the trial court findings and by the record. "In the period 1775-1785 the Missisquoi lost control of choice farmland along the Missisquoi River as English and Dutch settlers moved in." Pet. App. B 12, ¶41. In 1786 the Missisquoi "were claiming land and threatening to use force against the settlers". *Id.* at B 12, ¶42. "In 1786 the Missisquoi went 'underground' . . . [T]heir response to the influx of Europeans was withdrawal from central areas into other areas in the Missisquoi homeland, where they would be out of

sight." *Id.* at B 12, ¶43. In 1790 "[f]ace to face confrontations with yankees over their presence and control of land are of record." *Id.* at B 13, ¶48.

Petitioners dismiss the actions of the Vermont revolutionary government during the period 1777-91, saying that "[s]overeignty passed directly from Great Britain to the United States." Pet. at 18 n.11.[5] Congress negotiated directly with Vermont and characterized Vermont as a "state" before it was admitted to the Union, and not as a "district" within the jurisdiction of an existing state. *Compare* Acts of the First Congress, Sess. III, Ch. 4 (Feb. 4, 1791) (admitting the "district of Kentucky, within the jurisdiction of the Commonwealth of Virginia") and Ch. 7 (Feb. 18, 1791) (admitting the "State of Vermont"). Therefore, there is reason to treat the Republic of Vermont as a sovereign state. In any event, the "explicit ratification" of the Wentworth grants in Vermont's 1777 Constitution, Pet. App. B 78-79, at least put Congress and the world on notice as to the grantees' claims to jurisdiction and ownership of the area.

Finally, petitioners argue that Congress did not intend to impair the aboriginal claims of the Abenaki. The Vermont Supreme Court concluded otherwise, holding that "[t]here is no doubt that Congress considered and intended the New Hampshire Grants, in 1791, to be possessory." *Id.* at A 27. In reaching that conclusion the Court relied on the same history of negotiations that was cited

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[5] Petitioners cite to their Appendix at A 8-9 as support for this assertion, but the text does not support the claim. The Vermont Supreme Court did not decide whether Vermont achieved a sovereign status in this period.

by this Court in *Vermont v. New Hampshire*, and used it in much the same way. *See* 289 U.S. at 612 ("the terms of the Congressional resolution cannot be interpreted without regard to the previous negotiations"). The focus of these negotiations was "the claim of private property" under the Wentworth grants, Pet. App. A 17 n.8, and Congress finally admitted Vermont to the Union when Vermont and New York agreed upon "the confirmation of the New Hampshire township grants". *Vermont v. New Hampshire*, 289 U.S. at 611.

III. The Decision Of The Vermont Supreme Court Was Based Entirely On Record Evidence And Facts Established At Trial.

Petitioners argue that the Vermont Supreme Court "retried" the case because the Court's decision refers to historical texts not introduced into evidence at the proceeding below. As a result, petitioners reason that their due process rights were violated by the Court's use of these materials. Petitioners are disingenuously critical of the Court's exhaustive discussion of pertinent historical facts and, at the same time, absentminded about parallel sources adduced at the hearing below that comprehend the same points.

The respondent agrees that the Vermont Supreme Court did refer to historical sources besides those relied on by the witnesses. However, the Court did not select facts *dehors* the record. Just as a trial court might fashion an instruction in its own language, the High Court was at liberty to consider cogent additional viewpoints that echoed matters already of record.

Petitioners single out four instances where the Vermont Supreme Court allegedly introduced "new facts without the benefit of the adversary process." Pet. at 21. Examination of these examples reveals that these "facts" are already of record. Petitioners protest two references to the dispute regarding the overlapping grants held by both the New Hampshire and the New York grantees. See Pet. App. A 15. The trial court's findings are studded with examples that discuss the competing claims for the same granted land. See, for example, Pet. App. B 31, ¶121; B 84. See also Order of the King in Council at Resp. App. A 1-3 that forbids the Governor of New York from making grants of lands already patented by New Hampshire. Because this factual area was fully litigated at the trial court, references in the Vermont Supreme Court's opinion to the ongoing land disputes and the grantees' responses presented no surprise to the petitioners.

Petitioners claim error associated with the mention of the Green Mountain Boys. Again, while the parlance is different, the content of the material at Pet. App. A 17 is identical to the trial court's own findings that note the presence of conflict between the New Hampshire grantees, including Ethan Allen, and the New Yorkers. See examples cited above. Below, both parties discussed the ongoing rivalry between New Hampshire and New York landowners.

Lastly, petitioners refer to Pet. App. A 22. The language common to all the grants made by the Royal Governor of New Hampshire directed the grantees to plant and cultivate the land and to make continuous improvements within specified time periods upon penalty of forfeiture. Pet. App. A 13 n.4. The record also demonstrated

that "[p]etitioners expended large sums of money in settling and cultivating the same." Resp. App. A 2. The record supports a tacit understanding that settlement in this region would continue with the support of the British government.

Petitioners' argument completely ignores the character of the evidence adduced at the trial court. Because the Supreme Court of Vermont did not "retry" this cause when the Court cited other additional authorities, there is no merit to petitioners' claim.

CONCLUSION

The Supreme Court of Vermont applied settled legal standards to the unique factual record of this case. Petitioners' claims that the Vermont Supreme Court wrongly applied this Court's precedents and relied on non-record evidence do not merit review by this Court. Moreover, the cause is not yet final.

Dated: January 18, 1993

Respectfully submitted,

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

by: SUSAN R. HARRITT
Counsel of Record
Assistant Attorney General
Attorney General's Office
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

Attorney for Respondent

WILLIAM GRIFFIN
Of Counsel

ORDER OF THE KING IN COUNCIL

FORBIDDING THE GOVERNOR OF NEW YORK TO MAKE GRANTS OF ANY LANDS ALREADY PATENTED BY NEW HAMPSHIRE.

[Council Minutes Vol. XXVI.]

At the Court at St Jame's the 24th day of July 1767.

PRESENT.

THE KING'S MOST EXCELLENT MAJESTY.

Archbishop of Canterbury.	Earl of Shelburne.
Lord Chancellor.	Viscount Falmouth.
Duke of Queensbury.	Viscount Barrington.
Duke of Ancaster.	Viscount Clare.
Lord Chamberlain.	Bishop of London.
Earl of Litchfield.	Mr Secretary Conway.
Earl of Bristol.	Hans Stanley Esquire.

WHEREAS there was this day read at the Board, a Report from the Right Honorable the Lords of the Committee of Council for Plantation affairs, dated the 30th of last month in the words following viz

"Your Majesty having been pleased to refer unto this Committee the humble Petition of the Incorporated Society for the Propagation of the Gospel in foreign Parts, Setting forth among other things, that Benning Wentworth Esquire Governor of New Hampshire in New England, made several Grants of Large Tracts of Land lying on the West side of Connecticut River, which were incorporated into above one hundred Townships, and several shares were reserved in each of the said Grants to the Petitioners for a Glebe for the Church of England, and for

the benefit of a School: That the Government of New York having claimed the said Lands and the Jurisdiction thereof, granted great part of those Lands without reserving any shares for the abovementioned Public Uses: And therefore the Petitioners Pray that the Grants made by the Government of New Hampshire may be ratified and confirmed, or such order made thereupon as to your Majesty should seem meet – and your Majesty having been likewise pleased to refer unto this Committee the humble Petition of Samuel Robinson of Bennington in North America on behalf of himself and more than one thousand other Grantees of Lands on the West side of Connecticut River, under Certain Grants issued by the said Governor of New Hampshire. Setting forth amongst other things, that the said Governor made Grants to the Petitioners of several Tracts of Land lying as aforesaid on the Western side of the Connecticut River, which were incorporated into above one hundred Townships and supposed to lie within the government of New Hampshire, whereupon the Petitioners expended large sums of money in settling and cultivating the same. That on the 20th of July 1764 the said Lands having been declared by your Majesty to be within the Government of New York, the Lieutenant Governor of that Province made grants of part of the said Lands included within the Petitioners Grants, which being of infinite prejudice to them; they therefore most humbly pray (amongst other things) that their said several Grants made by Governor Wentworth may be ratified and confirmed under your Majesty's Royal Order. The Lords of the Committee in obedience to your Majesty's said Order of Reference, have taken the said Petitions into their Consideration, together with a

Report made by the Lords Commissioners for Trade and Plantations upon the former of the said Petitions, and do thereupon agree humbly to report as their opinion to your Majesty, that the most Positive orders should be immediately sent to the Governor of New York, to desist from making any Grants whatsoever of any Part of those Lands, until your Majesty's further Pleasure shall be known."

His Majesty taking the said Report into Consideration, was pleased with the advice of his Privy Council to approve thereof and doth hereby strictly charge require and command that the Governor or Commander in Chief of his Majesty's Province of New York for the Time being, do not (upon Pain of his Majesty's highest displeasure) presume to make any Grant whatever of any Part of the Lands described in the said Report, until his Majesty's further Pleasure shall be known concerning the same.

W: SHARPE.

On Reading and due Consideration Whereof, [20th October 1769] his Honour the Lieutenant Governor was pleased to require the opinion of the Council, whether his Majesty's said order extended to restrain the Granting of any Lands formerly claimed by New Hampshire, but which have not been granted by that Government: the Council thereupon declared they were of opinion his Majestys said order prohibited only the granting of such of the said Lands as have actually been granted by the Government of New Hampshire, and does not extend to any part of the said Lands which have not been granted by that Government.

B1

DEPOSITION OF GORDON M. DAY

* * *

August 25, 1987

* * *

[page 132]

Q. When did these grants of Benning Wentworth occur?

A. I'm not quite certain but sometimes these grants are made fairly early on, while Wentworth was lining his pockets and then subsequent sales and resales took place but the appearance of the settlers around 1670, began around 1670 I believe.

* * *

CORRECTIONS

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PAGE

132 (lines 15-16) *1760* for '1670'

Supreme Court, U.S.
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No. 92-877

In The

Supreme Court of the United States

October Term, 1992

RALEIGH ELLIOTT, MARK ROCHELEAU, RICHARD ROWE and SYLVIA WELLS,

Petitioners,

vs.

STATE OF VERMONT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

PETITIONERS' REPLY BRIEF

NEIL H. MICKENBERG, ESQ.
Counsel of Record
29 Pine Street
P.O. Box 406
Burlington, VT 05402-0406
(802) 658-6951

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

PETITIONERS' REPLY BRIEF

ARGUMENT

I. Respondent's Brief Mischaracterizes the Legal Standard For Extinguishment That Was Employed By The Vermont Supreme Court

Respondent's assertion that the Vermont Supreme Court adhered to this Court's holdings in the area of aboriginal rights seriously mischaracterizes the decision below. The decision represents a radical departure from not only this Court's well established judicial policies regarding the rights of Indians, but also from the particular legal requirements and standards for the extinguishment of aboriginal rights. Indeed, the decision below

creates confusion and threatens to undermine federal judicial policy in an area of law in which the Federal Government has exclusive authority. "[F]ederal law . . . protected Indian occupancy and . . . its termination was exclusively the province of federal law." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).

Far from adhering to this Court's mandate that evidence of extinguishment must be "clear and unambiguous" and cannot be "lightly implied", the decision below effectively determined that an extinguishment could be both lightly implied and determined on the basis of the most ambiguous of evidence.

Respondent's attempt to analogize the Vermont Supreme Court's "weight of history" doctrine with this Court's reference to the "historical setting" in *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 358 (1941), points up the essential and fundamental flaws in the Vermont Court's analysis. Unlike the decision below, this Court did not use the "historical setting" as the legal standard for extinguishment. Rather, that setting served merely as part of the evidence to be considered in connection with the legal standard.

The "historical setting" referred to in *Santa Fe* consisted of a long standing effort by the Federal Government to settle the Walapai Indians on a reservation and the ultimate, formal acceptance by the tribe, "in council assembled", of a reservation. *Id.* at 356. This Court relied upon this evidence because it met the legal standards for extinguishment. By contrast, this Court refused to rely upon evidence which did not meet the legal standard. Thus, the Court refused to permit an extinguishment to

be premised on unauthorized military action of the Indian Department or even on Federal legislation which created a reservation for the Walapai's but which did not express a clear intent to extinguish their aboriginal rights. *Id.* at 353, 355-56.

By contrast, the Vermont Supreme Court's decision fails to point to any expression of intent by a sovereign to extinguish the Abenaki's rights to their ancestral homeland. The decision cites a variety of historical events, but none of these events evince an intent to extinguish the Abenaki's rights, either generally or at the site of the fishing in this case. Moreover, under the Vermont decision, the events themselves become the legal yardstick for extinguishment, rather than simply evidence to be considered against the legal template established by this Court's decisions.

II. Respondent's Brief Inaccurately Portrays The Extent Of European Settlement And Abenaki Occupancy Of Missisquoi At The Time Of Vermont's Admission To The Union

Respondent's efforts to portray white settlement in Missisquoi as significant prior to Vermont's admission to the Union is flatly contradicted by the undisturbed findings of the trial court. Thus, Respondent's claim that the trial court's finding that settlement in Missisquoi did not begin until 1783 is somehow an error or unsupported by the evidence ignores the fact that that finding was made twice by the trial court. ("Even in 1783, following the American Revolution, only a handful of Europeans were

settled in Missisquoi.") Pet. App. B 22, FF 104.[1] Far from being unsupported by the evidence, this finding cites to testimony by Professor Colin Calloway, one of Petitioner's expert historians. That testimony, in response to a question by an assistant Attorney General, explicitly supports the trial court's finding. *See also* Pet. App. B 30, FF 115.

In fact, the trial court made numerous findings which support its conclusion that while the tribe lost "some lands it formerly held", "British maps, oral traditions and public records confirm the continued existence of the Missisquoi community in the 1790's." Pet. App. B 12, FF 47. *See also* Pet. App. B 13-14, FF 48 - 56 and B 36, FF 128. While there was some white encroachment in Missisquoi at the time of Vermont's entry into the United States in 1791, the territory clearly was still predominantly occupied by the Abenaki's.

The point is important because even if one were to fully accept the Vermont Supreme Court's analysis, that approach is dependent upon possession and cultivation of Missisquoi by white settlers pursuant to the Wentworth grants at the time of Vermont's admission to the

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[1] The reference by Respondent at page 3 of its Brief to a 1767 petition by a Wentworth grantee on behalf of one thousand other grantees is highly misleading. The grantee in question was from Bennington, in extreme southern Vermont. The petition is on behalf of grantees of lands "on the West side of (the) Connecticut River". Resp. App A 2. The Connecticut River is Vermont's eastern border. Missisquoi is the northwestern portion of Vermont. Southern Vermont was settled long before Europeans began venturing to Missisquoi. The reference to the petition does not and cannot undermine the trial court's findings.

Union in 1791. In fact, white settlement was sparse; there is no showing that the settlement was pursuant to the Wentworth grants and the trial court's findings show that the fishing in this case took place at what had been the Abenaki central village, which remained occupied until 1798.

CONCLUSION

Petitioners respectfully urge this Court to grant their Petition, and reverse the Vermont Supreme Court's denial of Petitioners' motion to dismiss.

DATED: February 3, 1993.

Respectfully submitted,

NEIL H. MICKENBERG, ESQ.
Counsel of Record
MICKENBERG, DUNN, SIROTKIN
& DORSCH
P.O. Box 406, 29 Pine Street
Burlington, VT 05402-0406
Telephone: (802) 658-6951

Attorney for Petitioners